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Joshua Herman

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DEATH DENIES DUE PROCESS: EVALUATING DUE PROCESS CHALLENGES TO THE FEDERAL DEATH PENALTY ACT

Who was it? A friend? A good man? Someone who sympathized? Someone who wanted to help? Was it one person only? Or was it mankind? Was help at hand? Were there arguments in his favor that had been overlooked? Of course there must be. Logic is doubtless unshakable, but it cannot withstand a man who wants to go on living. Where was the Judge whom he had never seen? Where was the high Court, to which he had never penetrated? He raised his hands and spread out all his fingers.

—Franz Kafka, *The Trial*¹

INTRODUCTION

In a three-month span in 2002, two district courts declared the Federal Death Penalty Act (FDPA) unconstitutional.² *United States v. Quinones*³ and *United States v. Fell*⁴ each held that the FDPA fails to protect the due process rights of federal capital defendants. While the conclusions in *Quinones* and *Fell* are noteworthy, the cases are especially significant because each used the Due Process Clause of the Fifth Amendment⁵ rather than the Cruel and Unusual Punishment Clause of the Eighth Amendment.⁶ Each case applied the Due Process Clause as “a guarantee of legality itself, legality not of the formal or superficial kind, but of the fundamental, inherent form.”⁷ These decisions emphasize that the fundamental interests at stake in capital cases are individual human lives.

Quinones and *Fell* both used the Due Process Clause, but each decision presented a distinct analysis. *Quinones*, which preceded *Fell*,

1. FRANZ KAFKA, *THE TRIAL* 228 (Willa Muir & Edwin Muir trans., 1956) (1937).

2. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598 (2000).

3. *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002); *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

4. *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), *rev'd* *United States v. Fell*, 360 F.3d 135 (2d Cir. 2004).

5. U.S. CONST. amend. V (stating that no person shall be deprived of “life, liberty, or property, without due process of law”).

6. U.S. CONST. amend. VIII.

7. RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND”* 604 (2d ed. 1973).

used a substantive due process analysis when it considered the constitutionality of the FDPA in light of evidence that death penalty systems have failed to distinguish the innocent from the guilty.⁸ The compelling evidence before the *Quinones* court included over one hundred death row exonerees, some of whom came within hours of execution for crimes they did not commit.⁹ *Fell* applied a procedural due process analysis and examined the validity of the relaxed evidentiary standard at the FDPA sentencing hearing.¹⁰ Despite these distinct focuses, an overriding concern for heightened reliability binds *Quinones* and *Fell* to each other and to the body of death penalty jurisprudence. By concluding that the FDPA condones lowered reliability,¹¹ *Quinones* and *Fell* provide substance to the language of death penalty jurisprudence that is too often aspirational rhetoric.¹²

The discomfort with the current administration of the death penalty that *Quinones* and *Fell* voice does not exist in a vacuum. The etiology of that unease does not reveal a single source. Each decision is both emblematic and a product of the sea change that marks America's attitude toward the death penalty. The decisions do not, however, merely mirror public opinion polls or encapsulate a *cause célèbre*. Both opinions potentially represent significant legal developments in death penalty jurisprudence.

This Comment submits that the Due Process Clause presents viable grounds for challenging the constitutionality of capital punishment. As *Quinones* and *Fell* show, a due process challenge has a flexibility that the traditional Eighth Amendment challenge lacks. Also, by focusing on the individual rights at stake, due process challenges rephrase the critical inquiry from institutional concerns to individual rights. This Comment first considers a broad range of perspectives in order to understand the context and implications of *Quinones* and

8. *Quinones*, 205 F. Supp. 2d at 257.

9. *Id.* at 265.

10. *Fell*, 217 F. Supp. 2d at 490-91.

11. *Quinones*, 205 F. Supp. 2d at 268; *Fell*, 217 F. Supp. 2d at 491.

12. See Adam Thurschwell, *Federal Courts, the Death Penalty, and the Due Process Clause: The Original Understanding of the "Heightened Reliability" of Capital Trials*, 14 FED. SENT. R. 14 (2001). Thurschwell notes that the Supreme Court's admonishments for heightened reliability and increased accuracy in capital cases

have for the most part remained mere rhetoric, as the special protections theoretically afforded to capital defendants under the Eighth Amendment have turned out to be almost valueless in practice. The tendency among academics and defense lawyers has been to bewail this phenomenon as judicial hypocrisy. Whatever the merits of that view as a matter of individual judicial psychology or politics, it has deeper roots in an underlying conceptual weakness in the Court's attempt to use the Eighth Amendment as the primary vehicle for guaranteeing the heightened reliability of capital procedures.

Id. at 15 (footnote omitted).

Fell. Subpart II(A) discusses current attitudes toward the death penalty.¹³ That section surveys how the general public and federal and state legislatures have reacted to the increasing evidence of the rates of error, indications of racial bias, and other important issues involving capital punishment.

Subpart II(B) discusses wrongful convictions and the studies that attempt to discover why they occur.¹⁴ In subpart II(C), the focus switches to the United States Supreme Court's position on the death penalty, which includes a brief summary of the seminal cases and more recent decisions.¹⁵ Current and developing attitudes toward capital punishment and the Supreme Court's stance on the issue create the conflict that surges through *Quinones* and *Fell*. After introducing this conflict, subpart II(D) discusses the FDPA by providing a general outline of that statute's history, an explanation of its critical provisions, and a brief sample of cases interpreting it.¹⁶ After discussing the FDPA, *Quinones*¹⁷ and *Fell*¹⁸ are examined.

Subpart III(A) discusses briefly the role of the Due Process Clause in capital punishment jurisprudence.¹⁹ That section shows that the Due Process Clause is available for challenging death sentences, but it has historically been used in a relatively limited capacity. Subpart III(B) then turns to *Quinones*.²⁰ The central topics of this analysis include: identifying the underlying concerns that motivated the decisions, examining the Supreme Court's position on the role of innocence in capital cases as represented in *Herrera v. Collins*,²¹ answering why the district court applied the Due Process Clause instead of the Eighth Amendment, and discussing how the United States Court of Appeals for the Second Circuit erred by misreading *Herrera* and failing to address the district court's due process analysis. Subpart III(C) discusses *Fell*.²² Similar to the *Quinones* analysis, the discussion of *Fell* examines the issues that motivated the district court to hold the FDPA unconstitutional. That section discusses the role of the "elements rule" that *Apprendi v. New Jersey*²³ announced and *Ring v. Ari-*

13. See *infra* notes 28-90 and accompanying text.

14. See *infra* notes 91-133 and accompanying text.

15. See *infra* notes 134-179 and accompanying text.

16. See *infra* notes 180-239 and accompanying text.

17. See *infra* notes 240-326 and accompanying text.

18. See *infra* notes 327-381 and accompanying text.

19. See *infra* notes 384-422 and accompanying text.

20. See *infra* notes 423-583 and accompanying text.

21. *Herrera v. Collins*, 506 U.S. 390 (1993).

22. See *infra* notes 584-766 and accompanying text.

23. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

*zona*²⁴ extended to capital cases. Subpart III(C) contends that the Second Circuit erred when it reversed *Fell* because it did not view the FDPA sentencing hearing as a distinct trial and also because it construed the requirement for heightened reliability in a manner that threatens the reliability of federal capital sentencing hearings. Subpart III(C) also submits that the rules of evidence should be applied unilaterally to the Government at the sentencing stage, which would increase the reliability of evidence at sentencing and also enable the sentencer to make individualized sentencing determinations.²⁵ Part IV discusses the impact of *Quinones* and *Fell*.²⁶ That section evaluates the importance of the due process analyses applied in *Quinones* and *Fell*. That section also discusses how reform efforts may normalize underlying causes of error while giving the false impression of a “fixed” FDPA. Part V concludes with a brief summary.²⁷

II. BACKGROUND

Quinones and *Fell* exist in a context of contrasting and turbulent forces. This section provides an overview of death penalty moratoriums, state and federal legislation, and studies of capital punishment. After that overview, this section discusses the seminal death penalty cases. Subsequent to an examination of the relevant provisions of the FDPA and cases interpreting the statute, the *Quinones* holdings, *Fell*, and the Second Circuit’s reversals of these decisions are explained.

A. America’s Death Penalty

Capital punishment in the United States is under intense scrutiny.²⁸ Critical examination of capital punishment has revealed that serious

24. *Ring v. Arizona*, 536 U.S. 584 (2002).

25. See *infra* notes 702-766 and accompanying text.

26. See *infra* notes 767-821 and accompanying text.

27. See *infra* notes 822-828 and accompanying text.

28. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000) (noting that the incentives of both prodeath penalty and antideath penalty actors are skewed and heavily influenced by extrinsic forces, such as political prestige, from the beginning of trial through the postconviction process); James S. Liebman, *The New Death Penalty Debate: What’s DNA Got To Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527 (2002) [hereinafter Liebman, *What’s DNA Got To Do with It?*] (“The nation is engaged in the most intensive discussion of the death penalty in decades.”); Jacob Cairns, *The Decline of Due Process in Capital Sentencing: Ramdass v. Angelone*, 30 CAP. U. L. REV. 193 (2002) (noting the increasing scrutiny of the death penalty); Douglas A. Berman, *Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 8 (2002) (“[T]here is a consensus that the modern death penalty system is badly broken despite the Supreme Court’s considerable regulatory efforts.”); *Death Penalty Doubts*, ST. PETERSBURG TIMES, Oct. 3, 2002, at 14A (noting how recent decisions reflect a “growing discomfort” with the implementation of the death penalty); Thalia Assuras, *Death Penalty Under Increasing Scrutiny* (CBS News: Evening News, June 23, 2001), available at 2001 WL 9861483

and systemic flaws plague it, which have in turn precipitated additional scrutiny.²⁹ Criticism of capital punishment is not a new topic of debate in America,³⁰ but never before has public discourse been so concerned and critical about its reliability and fairness.³¹

The current capital punishment debate is not isolated to specific groups; rather, examination of capital punishment is transpiring on a national level.³² Even Supreme Court Justices have voiced concern over the lack of fairness in capital punishment. In a recent speech, Justice Sandra Day O'Connor noted: "After 20 years on the high court, I have to acknowledge that serious questions are being raised

(discussing reasons why the death penalty is under increasing scrutiny); Eric Siegel, *Death Row—Despite a Lack of Evidence, Justice: A Judge Says a Man Sentenced to Die 12 Years Ago Might Be Innocent, but the State Resists Freeing Kevin Wiggins*, BALT. SUN, Oct. 14, 2001, at 1A (noting that reversal of murder conviction and invalidation of death sentence came when "the death penalty is undergoing increasing scrutiny in Maryland and elsewhere"); Lyle Denniston, *Rulings Reflect High Court's Uncertainty in Capital Cases*, BOSTON GLOBE, June 27, 2002, at A6 (noting that the death penalty is under attack throughout the nation and under intensified scrutiny.); *Why This Execution?* TIMES UNION, Aug. 15, 2001, available at 2001 WL 24804962 (noting the death penalty is undergoing an intense and critical scrutiny at a national level).

29. See generally Joan Biskupic, *Door Open to Death-Penalty Limits; Court Willing To Take a Look at Exceptions*, USA TODAY, June 21, 2002, at A3 (noting that concerns in flaws of the death penalty rules and exonerations have led to further questions about the integrity of the death penalty); Stuart Pfeifer, *California Courts Sentencing Fewer Killers to Death Row Justice; The Decline Comes as Violent Crime Falls*, L.A. TIMES, June 10, 2002, at A1 (noting that wrongful convictions and allegations of racial bias have led to increased scrutiny).

30. See Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1266 (2001) (Abolition was a topic of major concern in the late nineteenth and early twentieth centuries.).

31. *Id.* at 1265-68 (noting that the focus on the reliability of capital punishment rather than its morality is unique in the history of the capital punishment debate); see also Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1336 (2002) (reviewing AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2001)) (noting that the "palpable concern" over the use of capital punishment is as pronounced as it was in 1972 when the Court invalidated the death penalty); Thomas P. Sullivan, *Crime and Punishment: The Death Penalty Becomes a High-Profile Issue*, 49 FED. LAW. 34 (2002) (noting that public support is at a twenty-year low and that the death penalty debate has shifted "from the question of whether the death penalty is right in theory to whether it is fair in practice"). Even conservative death penalty supporters, such as George Will and Reverend Pat Robertson have commented on the unreliability of capital punishment systems. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1843-44 (2000).

32. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002). The authors note:

For the first time in several decades, across the United States, we stand at a moment of critical appraisal of our practice of capital punishment. Suddenly, in the past few years, concern and caution about the use of the death penalty have moved from the fringes to the center of public discourse.

Id.; see also Berman, *supra* note 28 at 4 (Both the "elected politicians and the general public . . . have been closely scrutinizing and significantly questioning our criminal justice system's embrace of this ultimate punishment.").

about whether the death penalty is being fairly administered in this country.”³³ Numerous states have taken steps to study their death penalties. Several states have ceased all executions and declared moratoriums in response to perceived inequity and unreliability in their death penalty systems.

1. Increased Scrutiny at the State Level

In 1999, Nebraska came close to declaring a moratorium on executions. On a 27-21 vote, the Nebraska legislature approved a bill that would have stopped executions while the fairness of the Nebraska capital punishment system was studied.³⁴ Despite the veto of the bill,³⁵ the Nebraska legislature appropriated money for the proposed study.³⁶ That study discovered that economic status of the victim, rather than race of the accused, determined the likelihood of a defendant receiving the death penalty.³⁷

In January 2000, former Illinois Governor George Ryan declared a moratorium on executions after the number of death row exonerations exceeded the number of executions.³⁸ As of April 2004, seventeen³⁹ individuals have been exonerated and twelve have been executed since the 1997 reinstatement of the death penalty in Illi-

33. Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty; Justice Re-thinking Laws She Shaped*, CHI. TRIB., Jul. 4, 2001, at N1.

34. *America's Nebraska Puts a Stay on Executions*, BBC Online Network (May 21, 1999), at <http://news.bbc.co.uk/1/hi/world/americas/349171.stm> (last visited Jan. 14, 2004).

35. American Civil Liberties Union, *ACLU of Nebraska Says Study Still Needed Despite Governor's Veto of Death Penalty Moratorium* (May 26, 1999), at <http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=8551&c=67> (last visited Jan. 15, 2004).

36. See Liebman et al., *supra* note 31, at 1841.

37. John Fulwider, *Study Says Money, Not Race, Makes a Difference in Death Penalty Cases*, NEB. STATE PAPER (Aug. 2, 2001), at http://nebraska.statepaper.com/vnews/display.v/ART/2001/08/02/3b6709bd55784?in_archive=1 (last visited Jan. 15, 2004). The study found that it was almost twice as difficult to avoid the death penalty when the victim was from an urban county. The history and mission statement of the Governor's Crime Control Commission is available at <http://www.nol.org/home/crimecom> (last visited Jan. 15, 2004).

38. See *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission To Review Capital Punishment System* (Jan. 31, 2000) at <http://www.state.il.us/gov/press/00/Jan/morat.htm> (last visited Jan. 15, 2004) [hereinafter *Governor Ryan Declares Moratorium*].

39. At the time Governor Ryan declared the moratorium, there had been thirteen exonerations. See Ken Armstrong & Steve Mills, *Justices Challenge Old Death Penalties; 2 Jurists Say They Should Be Voided*, CHI. TRIB., Sept. 28, 2001, available at 2001 WL 4119625. The "original" thirteen death row exonerees are: Joseph Burrows, Perry Cobb, Rolando Cruz, Gary Gauger, Alejandro Hernandez, Venereal Jimerson, Ronald Jones, Carl Lawson, Steven Manning, Anthony Porter, Steven Smith, Darby Tillis, and Dennis Williams. See *Illinois Death Penalty Exonerations*, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Illinois.htm> (last visited, Apr. 2, 2004). The number seventeen takes into account the four pardons Governor Ryan issued on January 10, 2003. See *infra* note 46 and accompanying text.

nois.⁴⁰ The risk of executing an innocent person was the most significant factor behind Governor Ryan's decision.⁴¹ After declaring the moratorium, Governor Ryan assembled a "blue ribbon" group to examine the Illinois death penalty and to make recommendations to reduce the high rates of error.⁴² The commission proposed eighty-five reforms in April 2002.⁴³ Illinois continued to be a cynosure of the national death penalty debate after public clemency hearings were held.⁴⁴

On January 10, 2003, Governor Ryan granted full pardons to former death row inmates Madison Hobley, Stanley Howard, Aaron Patterson, and LeRoy Orange.⁴⁵ In discussing the cases of each of these exonerees, Governor Ryan detailed the police brutality that led to coerced confessions.⁴⁶ For Governor Ryan, each of these cases represented a "manifest injustice"⁴⁷ and each pardon represented an "extraordinary action to correct manifest wrongs."⁴⁸ On January 11, 2003, Governor Ryan concluded that "the Illinois capital punishment system is broken" and commuted the death sentences of all inmates

40. 720 ILL. COMP. STAT. 5/9-1 (2002).

41. See, e.g., *Governor Ryan Declares Moratorium*, *supra* note 38 (quoting Governor Ryan stating: "I now favor a moratorium, because I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row"); Dolores Kennedy, *Illinois Moratorium on Executions Commands World's Attention*, at <http://www.justicedenied.org/illinois.htm> (last visited Jan. 15, 2004). As Governor Ryan said:

We have now freed more people than we have put to death under our system—13 people have been exonerated and 12 have been put to death. There is a flaw in the system, without question, and it needs to be studied . . . I will not approve any more executions in this state until I have the opportunity to review the recommendations of the commission that I will establish.

Id.

42. See *Executive Order as Issued by Former Governor George Ryan Creating the Commission on Capital Punishment*, at http://www.idoc.state.il.us/ccp/ccp/executive_order.html (last visited Jan. 15, 2004).

43. The Report of the Governor's Commission on Capital Punishment is available at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html> (last visited Jan. 4, 2004). The study has been described as a "road map of how to approach the problems of the death penalty." Henry Weinstein, *Illinois Panel Proposes Broad Reforms in Capital Punishment*, L.A. TIMES, Apr. 16, 2002, at A14.

44. Eric Slater, *In Illinois, Sweeping Review of Death Penalty*, L.A. TIMES, Oct. 16, 2002, at A1; Lois Romano, *On Trial in Illinois: The Death Penalty*, WASH. POST., Oct. 16, 2002, at A1.

45. Oliver Burkeman, *Illinois Pardons Four on Death Row: Governor "Plans To Commute Most Sentences"*, GUARDIAN (London), Jan. 11, 2003, at 16.

46. Governor George Ryan, Speech at DePaul University College of Law 12 (Jan. 10, 2003) (on file with DePaul Law Review). Governor Ryan discussed how each of these men were beaten and forced to confess to Chicago Police officers working under the command of former Lieutenant John Burge. *Id.* at 5-10.

47. *Id.* at 13.

48. *Id.* at 17.

on death row to life without parole.⁴⁹ Governor Ryan reiterated the unreliability and arbitrary nature of the Illinois capital punishment system and also its propensity for wrongful convictions.⁵⁰ Governor Ryan's decisions are unparalleled in scope.⁵¹

In May 2002, former Maryland Governor Parris Glendening ordered a moratorium on executions in Maryland and ordered a study of his state's capital punishment system to determine whether Maryland's death penalty was racially discriminatory.⁵² Wrongful convictions were not the primary motivating factors behind the moratorium,⁵³ despite knowledge of a wrongful capital conviction in Maryland.⁵⁴ The study found that race and geography affected capital punishment in Maryland.⁵⁵ The study found that sixty-seven percent of Maryland's death row is black, even though twenty-eight percent of Maryland's total population is black.⁵⁶ The study also found that one

49. Governor George Ryan, Speech at Northwestern University College of Law (Jan. 11, 2003), available at <http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html?page-wanted=print&position=top> (last visited Jan. 15, 2004) [hereinafter *Northwestern Speech*].

50. *Id.*

51. See Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation To Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 347-48 (1996) (noting that "twenty to twenty-five percent of death penalties were commuted" during the early- and mid-1940s but that "[i]n the last quarter century, there has been a dramatic decline in death penalty commutations—so much so that some say the clemency power is now defunct"). Other governors have commuted the sentences of all the death row inmates on their states' death row. In 1970, Winthrop Rockefeller, Governor of Arkansas, commuted the death sentences of fifteen inmates, who comprised Arkansas's entire death row. *An Open Letter to Governor Ryan* 2 (Dec. 30, 2002), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Law-ProfLet1.pdf> (last visited Apr. 2, 2004). In 1986, Tony Anaya, Governor of New Mexico, did the same, sparing the lives of five men, as did Robert Holmes, Governor of Oregon. *Id.* Lee Cruce, Governor of Oklahoma, commuted twenty-two death sentences from 1911-1915. *Id.* In 1991, Ohio Governor Richard Celeste commuted the death sentences of four men and four women on Ohio's death row. *Id.*; see also Alyse Bertenthal et al., *Clemency Petitions Show Deep Flaws in Death Penalty*, CHI. SUN-TIMES, Dec. 21, 2002, at 23.

52. See Richard Willing, *Md. Governor Halts Executions*, USA TODAY, May 9, 2002, available at 2002 WL 4725723; *Maryland's Governor Issues Death Penalty Moratorium* (May 14, 2002), available at <http://www.cnn.com/2002/LAW/05/09/maryland.death.penalty> (last visited Apr. 3, 2004); Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20.

53. Lori Montgomery, *Maryland Suspends Death Penalty*, WASH. POST, May 10, 2002, at A1.

54. Kirk Bloodsworth was convicted of capital murder and spent nine years in prison but was exonerated in 1993 on the strength of DNA evidence. See Sullivan, *supra* note 31, at 34-35.

55. The study was released on January 7, 2003. The executive summary of the study is available at <http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf> (last visited Jan. 15, 2004) and the complete study is available at <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (last visited Jan. 15, 2004). See also Susan Levine & Lori Montgomery, *Large Racial Disparity Found in Study of Maryland Death Penalty*, WASH. POST, Jan. 8, 2003, at A1.

56. Death Penalty Information Center (DPIC), *Maryland Study Finds That Race and Geography Play Key Roles in Death Penalty* (Jan. 7, 2003), at <http://www.deathpenaltyinfo.org/PR-DPICMarylandStudy.pdf> (last visited Jan. 15, 2004).

hundred percent of the victims of death row inmates were white.⁵⁷ Governor Robert Ehrlich, who succeeded Governor Glendening, lifted the moratorium when he took office in January 2003.⁵⁸

Many death penalty states have contemplated and continue to consider major reform efforts.⁵⁹ In 2001, eighteen states had pending moratorium legislation.⁶⁰ In 2003, bills to abolish the death penalty were introduced in fourteen state legislatures.⁶¹ Both houses of the Texas State Legislature approved a two-year moratorium, but the measure ultimately failed.⁶² In addition to the above mentioned state-initiated studies, Arizona, Connecticut, Delaware, Indiana, New Jersey, Nevada, and Virginia have commissioned studies to examine aspects of their death penalties.⁶³ In Indiana, former Governor Frank O'Bannon requested that existing safeguards be scrutinized to ensure that they protect against wrongful convictions.⁶⁴ Other reform efforts included bills signed in Arizona, Connecticut, Missouri, North Carolina, and Tennessee that called for excluding mentally retarded individuals from the death penalty.⁶⁵ Similar bills were passed in the Oklahoma, South Carolina, and Texas Legislatures, but were vetoed by those states' governors.⁶⁶ Currently, more than thirty-five states provide some type of postconviction DNA testing.⁶⁷ New Hamp-

57. *Id.* at 2.

58. Stephen Manning, *Maryland Court Puts Off Execution*, CHI. TRIB., Feb. 13, 2003, at 13N.

59. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 43-48 (2002). See generally the homepage of the National Coalition to Abolish the Death Penalty, available at http://www.ncadp.org/legislative_action.html (last visited Jan. 15, 2004) (providing updated links to state legislation involving capital punishment reform).

60. See *Legislative Update for 2001*, at http://www.quixote.org/ej/archives/updates/legislative_update_2001.html (last visited Jan. 15, 2004).

61. See *United States v. Sampson*, 275 F. Supp. 2d 49, 86 (D. Mass. 2003).

62. Marego Athans, *Death Penalty's Foes Lie Low: Protesters Take Quiet Approach*, BALT. SUN, June 12, 2001, at 1A.

63. DPIC, *Changes in Death Penalty Laws Around the U.S., 2000-2003*, at <http://deathpenalty-info.org/article.php?did=236&scid=40> (last visited Jan. 15, 2004). For other resources providing updated information on death penalty related legislation, see *The Death Penalty Moratorium Implementation Project of the American Bar Association*, at <http://www.abanet.org/moratorium> (last visited Jan. 15, 2004); Criminal Justice Reform Education Fund, *State Legislation Database*, available at <http://justice.policy.net/cjreform/stateleg> (last visited Jan. 15, 2004) [hereinafter *Criminal Justice Reform Education Fund*].

64. A.B.A., *TOWARD A GREATER AWARENESS: THE AMERICAN BAR ASSOCIATION CALL FOR A MORATORIUM ON EXECUTIONS GAINS GROUND: A SUMMARY OF MORATORIUM RESOLUTION IMPACTS FROM JANUARY 2000 THROUGH JULY 2001* 4 (2001), available at <http://www.abanet.org/irr/finalreport.doc> (last visited Jan. 5, 2004).

65. See generally Criminal Justice Reform Education Fund, *supra* note 63.

66. *Id.*

67. See Nina Morrison, Innocence Project, *Memorandum*, at http://innocenceproject.org/docs/IP_Legislation_Memorandum.html (last visited Jan. 16, 2004). However, all fifty states require the collection of DNA samples from specific classes of criminals and the maintenance of DNA

shire's state legislature voted to abolish the death penalty but Governor Jeanne Shaheen vetoed the bill.⁶⁸

2. *Scrutiny at the Federal Level*

Critical examination of capital punishment is not only a matter for the states. After consideration, Attorney General Janet Reno rejected a federal death penalty moratorium in 2000.⁶⁹ Bills that address concerns similar to those taken up by state legislatures, such as moratorium bills, have been proposed in the United States House of Representatives⁷⁰ and Senate.⁷¹

Senator Patrick Leahy proposed the Innocence Protection Act (IPA),⁷² spurred by the recognition that "there are death penalty problems across the nation, and as a nation we need to pay attention to what is happening."⁷³ The language of the IPA explicitly states that executing an innocent person and denying capital inmates access to exculpatory scientific evidence present grave moral and constitutional issues.⁷⁴ Central reforms of the IPA include minimum standards for

databases. See also Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179, 1211-12 (2003).

68. Rachel M. Collins, *N.H. Death Penalty Repeal Fails*, BOSTON GLOBE, Apr. 6, 2001, at B2.

69. That rejection was based on several grounds:

(1) defendants in federal capital cases are competently represented . . . (2) there is no issue of federal capital convicts being innocent of the crimes for which they have been sentenced to death, (3) the evidence and the law have justified the decisions in all cases to seek capital punishment, and (4) the study's findings did not show bias—as opposed to disparities which could result from non-invidious factors—in federal capital cases.

U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW AT Part (IIB) (2001), available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> (last visited Apr. 3, 2004) [hereinafter 2001 DEP'T OF JUSTICE STUDY].

70. See Accuracy in Judicial Administration Act of 2001, H.R. 321, 107th Cong. (2001); National Moratorium Act of 2001, H.R. 1038, 107th Cong. (2001).

71. See also National Death Penalty Moratorium Act of 2001, S. 233, 107th Cong. (2001); Federal Death Penalty Abolition Act of 2001, S. 191, 107th Cong. (2001). Commenting on the proposed National Death Penalty Moratorium Act, Senator Russell Feingold urged, "[L]et us pause to be certain we do not kill a single innocent person. This is not too much to ask of a civilized society." A.B.A., *supra* note 64, at 13.

72. Innocence Protection Act (IPA) of 2001, S. 486, 107th Cong. (2001). General information regarding the IPA, including its history, remarks by its sponsors in the House and Senate, testimony and letters of support, and the text of the IPA and the current status of the bills is available at <http://justice.policy.net/cjreform/ipa> (last visited Apr. 3, 2004).

73. Senator Patrick Leahy, *The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113 (2001).

74. "It shocks the conscience and offends social standards of fairness and decency to execute innocent persons or to deny inmates the opportunity to present persuasive evidence of their innocence." IPA § 104(a)(14) (quoted in Leahy, *supra* note 73, at 1126). Executing an innocent person is an "irremediable constitutional harm." *Id.* § 104(a)(16).

court-appointed defense counsel, increasing the availability of DNA testing, and preventing states from prohibiting capital inmates' access to DNA testing if such testing could lead to exculpatory evidence.⁷⁵ Congressman William Delahunt introduced the House companion bill to the IPA.⁷⁶ The House of Representatives passed the Innocence Protection Act, which was included in a bill entitled the "Advancing Justice Through DNA Technology Act of 2003,"⁷⁷ on November 5, 2003.⁷⁸

In September 2000, the United States Department of Justice released a study of the federal death penalty.⁷⁹ In addition to finding geographical disparities, the study revealed that U.S. Attorneys recommend the death penalty more often for minority defendants.⁸⁰ To explain the causes of the disproportionate amount of minorities in federal capital cases, former Attorney General Reno ordered a supplemental study.⁸¹ That study, which was released on June 6, 2001, acknowledged racial disparities⁸² but found no racial or ethnic bias.⁸³ Despite that conclusion, the study proposed several changes "to promote public confidence in the process's fairness and to improve its efficiency."⁸⁴

75. See Leahy, *supra* note 73, at 1115.

76. Innocence Protection Act of 2001, H.R. 912, 107th Cong. (2001). This bill closely tracks the language and purpose of the Senate bill.

77. H.R. 3214, 108th Cong. (2003).

78. See *The Innocence Protection Act in the 108th Congress*, available at <http://justice.policy.net/cjreform/ipa> (last visited at Jan. 16, 2004). For a section-by-section summary of the IPA, see http://justice.policy.net/proactive/newsroom/release.html?id=35262&PROACTIVE_ID=cecfc7dccc6ccc6cbc5cecfccfc5cececcc8c9cdcec6c9c5cf (last visited Apr. 3, 2004).

79. U.S. DEP'T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL STUDY, 1988-2000* (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> (last visited Jan. 5, 2004) [hereinafter 2000 DEP'T OF JUSTICE STUDY].

80. *Id.* at 6. Of the fifty-two individuals the government sought the death penalty against from 1988 to 1994, 75% (thirty-nine) were African-American and 10% (five) were Hispanic. During this period, seven, or 13%, of the federal capital defendants were white. Of the 682 individuals the government sought the death penalty against from 1995 to 2000, 48% (324) were African-American and 29% (195) were Hispanic. During this period, 134, or 20% of the total federal capital defendants were white.

81. See 2001 DEP'T OF JUSTICE STUDY, *supra* note 69.

82. The report acknowledged that "the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population." *Id.*

83. The study attributes the disproportion to the increased prosecution of crimes where minority groups are represented in greater proportions, such as drug trafficking and related criminal and gang violence. *Id.*

84. These changes include: requiring U.S. attorneys to fill out more forms even in potential capital cases where the U.S. attorney does not recommend seeking the federal death penalty; these forms will contain more detailed information regarding the race, gender, and ethnicity of the defendant; and providing an expedited process that gives the Attorney General more discretion and removes defense counsel participation in the review process if the U.S. Attorney does not recommend seeking the death penalty. *Id.*

3. Public Scrutiny of Capital Punishment

The majority of the American public still supports the death penalty; however, at sixty-four percent, public support for the death penalty is at a twenty-year low.⁸⁵ The decline in public support coincides with the willingness of states to take affirmative steps to examine their death penalties.⁸⁶ Forty-five percent of Americans support life without the possibility of parole as an alternative to the death penalty.⁸⁷ Eighty-two percent of Americans oppose the death penalty for the mentally retarded and seventy-three percent oppose the death penalty for the mentally ill.⁸⁸ Sixty-nine percent of Americans oppose the death penalty for juveniles.⁸⁹ The conduct of juries is another indicator of public opinion. As of August 14, 2003, juries in federal capital cases had rejected the death penalty in twenty out of twenty-one cases.⁹⁰

B. Evidence of Error: Wrongful Capital Convictions

Wrongful capital convictions are a significant cause of the nationwide reevaluation of capital punishment.⁹¹ Since 1973, one hundred

85. Polls conducted by Gallup and Pew Research Center both find support for the death penalty at 64%. A Fox News poll finds support at 69%. See DPIC, *National Polls: Public Support for Death Penalty Drops to 25 Year Low*, at <http://deathpenaltyinfo.org/article.php?scid=23&did=210#gallup200310> (last visited Jan. 16, 2004). See also Harris Poll #41 (Aug. 2, 2000), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=101 (last visited Jan. 5, 2004). See also Liebman, *supra* note 31, at 1839-40.

86. As *100th Person Freed from Death Row, Amnesty International Calls On State Governors To Halt All Executions*, U.S. NEWswire, Apr. 9, 2002, available at 2002 WL 4576170 (noting that there is "a growing nationwide trend that shows US states scrutinizing the application of the death sentence while US voters' support for the death penalty is holding at a 20-year low"); *Death Penalty Roulette: Serious Flaws Demand State Scrutiny*, MIAMI HERALD, Feb. 13, 2002, available at 2002 WL 12666999 (arguing that the numerous flaws in the Florida capital punishment system that lead to many death row exonerations call for a moratorium, review, and reforms).

87. See DPIC, *National Poll: Public Opinion Split on Preferred Punishment*, at <http://deathpenaltyinfo.org/article.php?scid=23&did=210#ABCNewsWashPost12403> (last visited Jan. 16, 2004).

88. See DPIC, *National Poll: Gallup Poll Probes National Opinion on the Death Penalty*, at <http://deathpenaltyinfo.org/article.php?scid=23&did=210#ABCNewsWashPost12403> (last visited, Jan. 16, 2004).

89. *Id.*

90. See Capital Defense Network, *Recent Developments*, at http://www.capdefnet.org/fdprc/contents/recent_dev/recent_developments.htm (last visited Apr. 4, 2004).

91. See Athans, *supra* note 62 (Even though popular support for the death penalty is still high, "the death penalty is under increasing scrutiny, especially because of the chance that innocent people might be put to death."); Berman, *supra* note 28, at 11 (observing that the "political climate surrounding the death penalty has shifted dramatically over the past few years as a result of greater public awareness of the problems plaguing the administration of capital punishment, particularly the problem of wrongful convictions"). The risk of executing the innocent has led

thirteen innocent individuals have been exonerated from death rows in twenty-five states.⁹² Wrongful convictions and the “risk of executing an innocent person pose[] a serious, perhaps unanswerable challenge to retributive justifications for capital punishment.”⁹³ Justice William Brennan considered wrongful convictions to be the “bleakest fact” of all of capital punishment’s flaws.⁹⁴ In addition to the incredible trauma the wrongfully convicted individual suffers,⁹⁵ wrongful convictions exert tremendous strains on the victims’ families.⁹⁶ Wrongful capital convictions also mean that the true murderer es-

traditional death penalty supporters to question the reliability of the death penalty. See Kirchmeier, *supra* note 59, at 42 (observing that concerns about executing the innocent and recent advances in DNA technology “have been the keystone of the rising conservative support for a moratorium on executions”); *Restoring Confidence in the Criminal Justice System*, 86 JUDICATURE 64 (2002) (“Convictions of innocent persons have damaged . . . trust and confidence [in the justice system], and a response is necessary to repair and rebuild them.”); Liebman, *What’s DNA Got To Do with It?*, *supra* note 28, at 547 (DNA exposes our systems as “flawed, unreliable, and untrustworthy” and “most powerfully motivates our national doubts about the current application of the death penalty.”).

92. DPIC, *Innocence and the Death Penalty: Exonerations by State*, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#state> (last visited Apr. 2, 2004) (The number of exonerations as of April 3, 2004 per state were as follows: Florida, 23; Illinois, 17; Oklahoma, 7; Texas, 7; Georgia, 6; Arizona, 6; Louisiana, 6; Pennsylvania, 5; New Mexico, 4; Ohio, 4; Alabama, 3; California, 3; Missouri, 3; North Carolina, 4; South Carolina, 3; Indiana, 2; Massachusetts, 2; Idaho, 1; Kentucky, 1; Maryland, 1; Mississippi, 1; Nebraska, 1; Nevada, 1; Washington, 1; and Virginia, 1).

93. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 471 (1996). In his article, Professor Gross suggested that erroneous convictions occur more often because of “factors that are common or inevitable in capital prosecutions, but that occur in other cases as well . . . [and] [b]ecause of consequences that flow from the demand for the death penalty itself.” *Id.* at 475. See also Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309, 323-24 (2000).

94. William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 4 (1994).

95. The 113 individuals exonerated from death row spent an average of nine years in prison. See DPIC, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Jan. 19, 2004). James Richardson spent twenty-one years in a Florida prison, falsely convicted of killing one of his children, before being exonerated. DPIC, *Cases of Innocence: 1973-Present*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109> (last visited Apr. 2, 2004).

96. DPIC, *A Broken System: Error Rates in Capital Cases, 1973-1975, A Summary of the Columbia University Study by Prof. James S. Liebman*, at <http://www.deathpenaltyinfo.org/article.php?scid=19&did=256> (last visited Jan. 19, 2004).

capas prosecution.⁹⁷ Wrongful convictions occur more frequently in capital as opposed to noncapital cases.⁹⁸

The increasing number of wrongful convictions and subsequent death row exonerations⁹⁹ challenge the public's confidence in the death penalty's reliability and fairness.¹⁰⁰ Wrongful capital convictions and the attendant risk of executing an innocent person have drawn the attention of several Supreme Court Justices. Justice O'Connor conceded the somber fact that "if statistics are any indication, the system may well be allowing some innocent defendants to be executed."¹⁰¹ Justice John Paul Stevens also recognized the problems of wrongful convictions: "[R]ecent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."¹⁰² Influenced by the pervasive role ineffective assistance of counsel plays in leading to wrongful convictions, Justice Ruth Bader Ginsburg publicly supported the Maryland death penalty moratorium.¹⁰³

Several recent studies conducted by a team led by Professor James Liebman support the revelations of capital punishment's fallibility. Professor Liebman's studies, *A Broken System: Error Rates in Capital*

97. See *Innocents on Death Row*, N.Y. TIMES, May 23, 1999, § 4, at 16; Ian Ith & Ken Armstrong, *Seattle Police Are Considering Videotaping All Interrogations; Photo Lineups Already Changed To Reduce Risk of Mistakes*, SEATTLE TIMES, Feb. 15, 2003, at A1; Steve Mills & Maurice Possley, *Police, Prosecutors Cling to Original Theories, Seldom Pursue New Leads, Suspects*, CHI. TRIB., Oct. 27, 2003, available at 2003 WL 66438055.

98. See Gross, *supra* note 93, at 474-97.

99. Over the past decade, the average number of exonerations per year (five), is nearly double that of the previous twenty years (2.75). See DPIC, *supra* note 92.

100. See Clarke et al., *supra* note 93, at 337 (concluding that "dissemination of information on the innocence issue reduces support for the death penalty" at a greater rate than promulgation of the death penalty's failure to deter crime achieves). See also Gross, *supra* note 93, at 470 (The "optimistic view" that the capital punishment system was reliable and that wrongful convictions never occurred "has become increasingly implausible.").

101. Associated Press, *O'Connor Questions Death Penalty* (July 3, 2001), at <http://www.cb-news.com/stories/2001/07/03/supremecourt/main299592.shtml> (last visited Jan. 12, 2004). Justice O'Connor made this observation in a speech to the Minnesota Women Lawyers Association. See also Armstrong & Mills, *supra* note 33. Significantly, Justice O'Connor acknowledges that innocent persons have not only been convicted, but that the system has so entirely failed them that they have indeed been executed. *Id.*

102. Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 490 n.13 (quoting Justice Stevens *Criticizes Election of Judges*, WASH. POST, Aug. 4, 1996, at A14).

103. Recognizing that competent counsel could mean the difference between life and death, Justice Ginsburg said, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial. . . . People who are well represented at trial do not get the death penalty." AP, *Death Penalty Moratorium Backed*, HOUS. CHRON., Apr. 10, 2001, available at 2001 WL 3012470.

Cases, 1973-1995,¹⁰⁴ and *A Broken System Part II: Why There is So Much Error in Capital Cases and What Can be Done About It*,¹⁰⁵ have changed the tenor of the death penalty debate by exposing the lack of reliability in capital punishment as a whole and the “resulting risk that people have been, and will continue to be, executed for crimes they did not commit or ones for which the law does not allow the death penalty.”¹⁰⁶

Professor Liebman and a team of researchers completed a major statistical study of modern American capital appeals in *A Broken System*.¹⁰⁷ Research began in 1991 at the request of Senator Joseph F. Biden, then Chair of the Senate Judiciary Committee.¹⁰⁸ The researchers examined over 4,578 of the 5,760 death sentences imposed in the United States from 1973 through 1995.¹⁰⁹ Overall, between 1973 and 1995, sixty-eight percent of all death sentences were overturned due to serious, reversible error.¹¹⁰ Of this sixty-eight percent, courts found that the defendants deserved a sentence less than death in eighty-two percent of the cases.¹¹¹ Seven percent of the individuals whose death sentences were reversed due to serious error were held to be actually innocent of the crimes for which they were sentenced to death.¹¹² These high rates of reversal due to serious error are not endemic to a specific jurisdiction; rather, high error rates are prevalent

104. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000), at <http://www2.law.columbia.edu/instructionalservices/liebman> (last visited Jan. 19, 2004).

105. James S. Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It* (Feb. 11, 2002), at <http://www2.law.columbia.edu/brokensystem2/index2.html> (last visited Jan. 19, 2004).

106. *Id.* at 10.

107. *A Broken System* was not the first comprehensive study of the death penalty system. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). At issue in *McCleskey* was the significance of the “Baldus Study,” which was “actually two sophisticated statistical studies that examine[d] over 2,000 murder cases that occurred in Georgia during the 1970’s.” *Id.* at 286. The study concluded “that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.” *Id.* at 287. The Court rejected this argument and held the Baldus Study only showed a “discrepancy” and thus “[did] not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.” *Id.* at 313. Unlike the Baldus Study, which only concentrated on a single significant aspect in examining the fairness of the Georgia capital sentencing process, *A Broken System* examined the overall reliability of capital punishment systems on a national scale.

108. Liebman et al., *supra* note 105, at 24.

109. Liebman et al., *supra* note 31, at 1847.

110. Liebman et al., *supra* note 104, at 5. Liebman defines “serious error” as: error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial.” Liebman, *supra* note 31, at 1850.

111. Liebman et al., *supra* note 104, at ii.

112. *Id.*

in every state that has a death penalty.¹¹³ Due to the high rate of error and the relatively few executions,¹¹⁴ Professor Liebman observed that the "death penalty system [is] collapsing under the weight of its own mistakes"¹¹⁵ and that courts "inevitably must fail to catch and correct some amount of the error that has flooded the system."¹¹⁶

A Broken System II identifies and analyzes the factors that contribute to the rates of error exposed in *A Broken System*.¹¹⁷ *A Broken System II* also discusses the ramifications that reversible error has on the judicial system, the defendant, and the public.¹¹⁸ Four factors contribute to eighty percent of the serious error at the postconviction stage:¹¹⁹ "egregiously incompetent lawyering";¹²⁰ prosecutorial or police misconduct, including withholding exculpatory evidence;¹²¹ improper jury instructions;¹²² and judge or juror bias.¹²³ The four errors at federal habeas are similar to those at the postconviction stage: improper jury instructions;¹²⁴ "egregiously ineffective assistance of counsel";¹²⁵ prosecutorial or police misconduct, including withholding

113. See *id.* at 8. Ninety-two percent of all states that have death penalties have error rates of at least 52%; 85% have error rates of at least 60%; and 61% have error rates of at least 70%. *Id.*

114. Only 313 of the 5,760 death sentences have resulted in executions. *Id.* at 4.

115. Leibman et al., *supra* note 104, at i.

116. *Id.* at 116 (emphasis omitted). Professor Liebman noted that the conclusions of *A Broken System* were corroborated by a Department of Justice study. See *id.* at 15-16. This study examined the final dispositions of the 263 death sentences that were imposed in 1989. *Id.* By 1998, the year of the study, 76% of the cases had been overturned. *Id.* Sixty-one percent of the cases were still under review in 1998. *Id.* This study also found that four times as many capital defendants received clemency or had their sentences overturned than those executed between 1973 and 1999. Leibman et al., *supra* note 104, at 15-16.

117. See Leibman et al., *supra* note 105, at 423 ("The central object of this study is to discover information of use in answering two questions. Why is there so much error in capital cases? Can anything be done to solve the problem or at least to moderate the amount of serious error?") (emphasis omitted).

118. *Id.* Reversible error,

nearly always undermines the reliability of the verdict that the defendant committed a crime that was aggravated enough to warrant death as a punishment; often risks the execution of people who are innocent of the crime or at least of the death penalty; and always frustrates the demands and expectations of the public who adopted the death penalty, the taxpayers who pay for it and the victims who directly rely on it.

Id.

119. *Id.* at 41.

120. See Leibman et al., *supra* note 105, at 41. (Incompetent lawyers contribute to 39% of serious error.).

121. *Id.* (Prosecutorial or police misconduct contribute to 19% of serious error.).

122. *Id.* (Improper jury instructions contribute to 19% of serious error.).

123. *Id.* (Judge or juror bias contributes to 4% of serious error.).

124. *Id.* (Improper jury instructions contribute to 39% of serious error.).

125. *Id.* (Ineffective assistance of counsel contributes to 27% of serious error.).

exculpatory evidence;¹²⁶ and judge or jury bias or striking African Americans as prospective jurors.¹²⁷ *A Broken System II* also finds that the more often a jurisdiction uses the death penalty, the higher the rate of serious error in capital cases within that jurisdiction.¹²⁸ Error rates are especially high when cases with low levels of aggravation are made capital cases in jurisdictions with low capital sentencing thresholds.¹²⁹

A Broken System II also explores why reform efforts are inhibited.¹³⁰ The study suggests ten reform options¹³¹ and warns against approaches that would increase error rates.¹³² The study observes that high error rates will cause the public to be “increasingly aware that, as currently imposed, the [death] penalty is a costly failure that

126. Liebman et al., *supra* note 105, at 41. (Prosecutorial or police misconduct contributes to 18% of serious error.).

127. *Id.* (Judge or jury bias or striking jurors based on race contributes to 7% of serious error.).

128. *Id.* at 425.

129. *See generally id.* at 339-51. Low capital sentencing thresholds and low levels of aggravation combine to expose more individuals to capital punishment and lead to death penalties for crimes that are not highly aggravated, or the “worst of the worst.” *Id.* at 340 (emphasis omitted).

130. The study observes that the more threatened the politically influential members of the community feel, the more susceptible to pressure judges will be, and the more common serious, reversible errors will be. *Id.* at 354-56. Reducing high error rates would also require many policymakers, who worked to enact capital sentencing statutes, to reverse their positions on the death penalty. Liebman et al., *supra* note 105, at 426.

131. *Id.* at 427. *See generally id.* at 395-417. These ten “policy options” are:

[R]equiring proof beyond any doubt that the defendant committed the capital crime; requiring that aggravating factors substantially outweigh mitigating ones before a death sentence may be imposed; barring the death penalty for defendants with inherently extenuating conditions—mentally retarded persons, juveniles, severely mentally ill defendants; making life imprisonment without parole an alternative to the death penalty and clearly informing juries of the option; abolishing judge overrides of jury verdicts imposing life sentences; using comparative review of murder sentences to identify what counts as ‘the worst of the worst’ in the state, and overturning outlying death verdicts; basing charging decisions in potentially capital cases on full and informed deliberations; making all police and prosecution evidence bearing on guilt vs. innocence, and on aggravation vs. mitigation available to the jury at trial; insulating capital-sentencing and appellate judges from political pressure; and identifying, appointing and compensating capital defense counsel in ways that attract an adequate number of well-qualified lawyers to do the work.

Id. at 427.

132. *See id.* at 427. *See generally id.* at 418-21. Steps that would increase serious error are:

[C]utting back further on the scope of review of capital verdicts, which would likely increase the ill-effects of chronic error and invite more error; making piecemeal additions to the list of qualifying aggravating circumstances; shifting to the state the full costs of local capital prosecutions; and, most importantly, doing nothing.

Liebman et al., *supra* note 105, at 427.

does not serve the purposes for which it was established and risks taking the lives of innocent people."¹³³

C. *A Brief Introduction to the Seminal Death Penalty Cases*

The recent shift from support to critical examination of the fairness and reliability of capital punishment systems and challenges to the constitutionality of capital punishment has occurred despite the United States Supreme Court's position that the death penalty is not *per se* unconstitutional.

1. *The Death Penalty is Not Per Se Unconstitutional*

In *Furman v. Georgia*¹³⁴ the Court invalidated all the death penalty statutes in the country in a brief *per curiam* opinion.¹³⁵ Through five concurring opinions, the Court held that the death penalty violated the Eighth and Fourteenth Amendments because it was "so wantonly and so freakishly imposed"¹³⁶ and risked arbitrary¹³⁷ and capricious¹³⁸ imposition of the death penalty. The Court invalidated the death penalty statutes because they lacked the effective procedural safeguards, not because the death penalty was *per se* unconstitutional.¹³⁹

In *Gregg v. Georgia*¹⁴⁰ the Court affirmed death penalty statutes that provided adequate direction and guidelines, safeguarded against the arbitrary imposition of the death penalty, and thus did not violate the Eighth Amendment.¹⁴¹ The Court emphasized that the death penalty was not *per se* unconstitutional.¹⁴² That conclusion was supported by the apparent acceptance of the death penalty by the framers.¹⁴³ The Court balanced the penological interests against the severity of

133. *Id.* at 422.

134. *Furman v. Georgia*, 408 U.S. 238 (1972).

135. *Id.* at 239-40. ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

136. *Id.* at 310 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

137. *Id.* at 276-77, 291-92 (Brennan, J., concurring).

138. *Id.* at 295 (Brennan, J., concurring); *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

139. "I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment." *Id.* at 310-11 (White, J., concurring); "Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment." *Id.* at 396 (Burger, C.J., dissenting).

140. *Gregg v. Georgia*, 428 U.S. 153 (1976).

141. *Id.* at 206-07.

142. *Id.* at 169. *See also id.* at 187 ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

143. *Id.* at 177-78.

the penalty to conclude that the death penalty comported with basic concepts of human dignity.¹⁴⁴ Bifurcating, or dividing capital proceedings into guilt or innocence and sentencing phases provided discretion and guidance.¹⁴⁵ Requiring that the jury find at least one statutory aggravating factor to exist narrowed the class of death-eligible defendants.¹⁴⁶ Mandatory expedited appellate review of all capital cases provided additional safeguards against arbitrary, excessive, or disproportionate sentences that were imposed on discriminatory grounds.¹⁴⁷ *Gregg* thus delineated the procedures necessary for a constitutional capital punishment system. Similar adequate procedural safeguards existed in *Proffitt v. Florida*¹⁴⁸ and *Jurek v. Texas*.¹⁴⁹ But those procedures were absent in *Woodson v. North Carolina*,¹⁵⁰ in which the Court invalidated North Carolina's death penalty statute because it made the death penalty mandatory after a conviction of capital murder.¹⁵¹ That mandatory sentencing scheme failed to address the requirement that adequate procedures guide the sentencer's discretion, and it prevented the sentencer from considering mitigation.¹⁵²

2. *The Role of the Eighth Amendment*

Furman and *Gregg* established the Cruel and Unusual Punishment Clause of the Eighth Amendment as the norm for challenging the constitutionality of the death penalty. *Gregg* instructs that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁵³ When assessing contemporary values to determine if a sanction violates the Eighth Amendment, the Court looks to "objective indicia that reflect

144. *Id.* at 182-88. The penological interests cited were deterrence of crime by future offenders and retribution.

145. *Gregg*, 428 U.S. at 190-93.

146. *Id.* at 196-97.

147. *Id.* at 198, 204-06.

148. *Proffitt v. Florida*, 428 U.S. 242 (1976).

149. *Jurek v. Texas*, 428 U.S. 262 (1976).

150. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

151. The North Carolina capital sentencing scheme represented the path some states chose to pursue post-*Furman*. Instead of limiting the sentencer's discretion, as in *Gregg*, the North Carolina capital sentencing scheme removed all discretion in enacting a mandatory death penalty statute. *Id.* at 300.

152. The Court also invalidated Louisiana's mandatory death penalty statute in *Roberts v. Louisiana*, because it prevented the jury from considering mitigating factors. 428 U.S. 325 (1976).

153. *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

the public attitude toward a given sanction.”¹⁵⁴ The Eighth Amendment also requires that the punishment “accord with the dignity of man.”¹⁵⁵

After *Furman*, thirty-five states enacted death penalty statutes that attempted to adhere to the Court’s holding.¹⁵⁶ According to *Gregg*, this “legislative response”¹⁵⁷ was an objective indication that the public accepted and desired the death penalty.¹⁵⁸ *Gregg* also held that the conduct of juries was an objective indication that showed the death penalty was not so offensive as to render it unconstitutional.¹⁵⁹

More recently, in *Atkins v. Virginia*,¹⁶⁰ the Court held that executing a mentally retarded person violates the Eighth Amendment. In so holding, the Court overturned *Penry v. Lynaugh*,¹⁶¹ which in 1989 stated: “[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.”¹⁶² *Atkins* demonstrates how the meaning of cruel and unusual punishment can change dramatically over a short period of time¹⁶³ and that the Eighth Amendment must be reinterpreted according to current standards of decency.¹⁶⁴

Soon after the Court decided *Atkins*, it refused to reconsider whether executing juveniles violates the Eighth Amendment. *Stan-*

154. *Id.* at 173.

155. *Id.* (quoting *Trop*, 356 U.S. at 101) (internal quotation marks omitted).

156. *Id.* at 179-80.

157. *Id.* at 179.

158. “At the time of *Furman*, fifty-seven percent of Americans favored the death penalty. By the time *Gregg* was decided, this number had risen to sixty-five percent.” Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1198 (2000).

159. *Gregg*, 428 U.S. at 181-82. The Court cited the spike in death sentences given by juries post-*Furman*. *Id.*

160. *Atkins v. Virginia*, 536 U.S. 304 (2002).

161. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

162. *Id.* at 335.

163. Sharp reversals in death penalty jurisprudence are not new. Neither is the *Penry-Atkins* reversal the most extreme. In 1971, the Court upheld the constitutionality of the death penalty in *McGautha v. California*, 402 U.S. 183 (1971), reversed its position in *Furman v. Georgia*, 408 U.S. 238 (1972), and then reversed its position again in *Gregg v. Georgia*, 428 U.S. 153 (1976).

164. The Court considered legislative action as objective evidence that capital punishment for the mentally retarded was excessive in light of prevailing standards of decency. At the time *Penry* was decided, only Georgia and Maryland barred executions of the mentally retarded. *Penry*, 492 U.S. at 334. The Court concluded that these two states, even when combined with the fourteen states that had no death penalty statutes, did not amount to a national consensus against the execution of the mentally retarded. *Id.* Noting that since *Penry*, a number of states have consistently enacted legislation barring the execution of the mentally retarded, the Court concluded that the sanction was contrary to evolving standards of decency. *Atkins*, 536 U.S. at 304-06.

*ford v. Kentucky*¹⁶⁵ upheld the use of the death penalty for defendants who were sixteen and seventeen at the time they committed capital crimes. In refusing to grant either a writ of certiorari¹⁶⁶ or the petition for a writ of habeas corpus¹⁶⁷ filed by Kevin Stanford, the Court declined to follow the example set by *Atkins*. Dissenting from the denial of the petition, Justice Stevens, joined by Justices Stephen Breyer, Ginsburg, and David Souter, argued that in light of the national consensus regarding the execution of juveniles, denying the petition was inconsistent with *Atkins*.¹⁶⁸ The Court also refused to consider whether it was unconstitutional under the Eighth Amendment for inmates to languish on death row for decades in *Foster v. Florida*.¹⁶⁹ Dissenting from the denial of certiorari, Justice Breyer argued that the twenty-seven years Charles Foster spent on death row in Florida was "unusual by any standard"¹⁷⁰ and deserved consideration by the Court. Thus, *Atkins* should not be interpreted as a signal of the Court's greater willingness to apply the Eighth Amendment to a wide range of capital cases.¹⁷¹

3. *Ring v. Arizona: A Challenge Not Based on the Eighth Amendment*

*Ring v. Arizona*¹⁷² shows that the Eighth Amendment is not the exclusive means of challenging a death penalty statute. In *Ring*, the Court held that Arizona's death penalty statute violated the Sixth and

165. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

166. *Stanford v. Parker*, 537 U.S. 831 (2002).

167. *In re Stanford*, 537 U.S. 968 (2002).

168. Twenty-eight states prevent the execution of juveniles, while thirty states prevent the execution of the mentally retarded. *Id.* at 968-69.

169. 537 U.S. 990 (2002).

170. *Id.* at 992.

171. *But see Roper v. Simmons*, 124 S. Ct. 1171 (2004). The Supreme Court has granted certiorari to review a Missouri Supreme Court decision, *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), in which the court held that executing individuals who were under eighteen years of age at the time the capital crime was committed violated the Eighth Amendment. The Missouri Supreme Court expressly relied on *Atkins*:

Applying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade. Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments.

Id. at 399-400 (footnote omitted).

172. *Ring v. Arizona*, 536 U.S. 584 (2002).

Fourteenth Amendments.¹⁷³ The Arizona law that *Ring* invalidated required at least one aggravating factor to be found before the death penalty could be imposed.¹⁷⁴ The law allowed the judge, sitting alone, to find that aggravating factor and thus trigger the death penalty.¹⁷⁵ Prior to a judge's finding of an aggravating factor, the maximum penalty the defendant could receive was life in prison. Following *Apprendi v. New Jersey*,¹⁷⁶ the Court held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."¹⁷⁷ The Court looked to the effect of the fact at sentencing, rather than its form.¹⁷⁸ Because an aggravating factor raised the maximum penalty, it was the functional equivalent of an element of the crime. Directing part of his concurrence at Justice Breyer, Justice Antonin Scalia emphasized that the Eighth Amendment was not relevant to the holding because the Eighth Amendment does not mandate jury sentencing.¹⁷⁹ Justice Scalia's concurrence underlines that it is possible to successfully challenge a death penalty statute without going through the Eighth Amendment.

D. The FDPA

1. A General Overview of the Statute

The federal death penalty has a long yet piecemeal legacy in American history.¹⁸⁰ The first federal execution occurred in 1790.¹⁸¹ As of March 1, 2004, three hundred thirty-six men and four women have been executed under federal jurisdiction.¹⁸² The federal death penalty

173. In doing so, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990).

174. *Ring*, 536 U.S. at 593.

175. *Id.* at 588.

176. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

177. *Ring*, 536 U.S. at 589.

178. *Id.* at 602. As Justice Scalia colorfully points out in his concurrence,

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Id. at 610 (Scalia, J., concurring).

179. *Id.* at 612-13 (Scalia, J., concurring).

180. See John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 942-45 (1998).

181. On June 25, 1790, Thomas Bird was hanged in Maine for murder. *Id.* DPIC, *Federal Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=147#statutes> (last visited Apr. 2, 2004).

182. *Id.* There have been thirty-four federal executions from 1927 to 1963. Cutler, *supra* note 158, at 1196. The last pre-FDPA execution occurred on March 15, 1963. *Id.* Victor Feguer was hanged for kidnapping and murder. *Id.* There have been three executions under the FDPA.

experienced significant reform in 1897 when the death penalty was repealed for all federal offenses, save five, and imposing the death sentence became a discretionary, instead of a mandatory, decision.¹⁸³ After *Furman*, the federal government did not attempt to revive the federal death penalty until 1988,¹⁸⁴ when it enacted the Drug Kingpin Act.¹⁸⁵

A direct product of the “war on drugs,”¹⁸⁶ the Drug Kingpin Act created a death sentence for a homicide committed during a violation of drug control or enforcement laws.¹⁸⁷ “Drug Kingpin” is a misleading title because anyone involved in a drug conspiracy who is convicted of a murder that resulted from drug activity is death-eligible, not just “kingpins.”¹⁸⁸ In 1994, Congress enacted the FDPA as part of an omnibus crime bill, the Violent Crime Control and Law Enforcement Act of 1994.¹⁸⁹ Congress enacted the FDPA to increase the number of federal capital crimes and to provide an expanded federal system to impose the death penalty.¹⁹⁰ The FDPA expanded the death penalty to sixty¹⁹¹ different crimes,¹⁹² but this does not mean that the FDPA created sixty crimes.¹⁹³ One way to consider the effect the FDPA has on existing substantive criminal law is that it “merely applies its procedural provisions to these crimes, making them death

Timothy McVeigh was executed on July 11, 2001; Juan Raul Garza was executed on June 19, 2001; Louis Jones, Jr., was executed on March 18, 2003. See DPIC, *Federal Executions, 1927-2003*, at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=149> (last visited Jan. 17, 2004).

183. See Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529 (2000).

184. Charles C. Boettcher, *Testing the Federal Death Penalty Act of 1994*, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones, 132 F.3d 232 (5th Cir. 1998), 29 TEX. TECH L. REV. 1043, 1047 (1998). See *id.* at 1053-57 for background of the political environment during the drafting of the Drug Kingpin Act and the FDPA.

185. Drug Kingpin Act of 1988, 21 U.S.C. § 848 (1988).

186. Cutler, *supra* note 158, at 1201.

187. See generally *id.* at 1201-08.

188. Boettcher, *supra* note 184, at 1054-55.

189. See generally *id.* at 1053-60 for background on the political atmosphere preceding and during the enactment of the FDPA.

190. Cutler, *supra* note 158, at 1209.

191. These crimes can be divided into three categories: “(1) crimes involving risky activity resulting in a homicide, such as the kidnapping or hostage-taking resulting in death; (2) crimes involving direct homicide, such as the murder of governmental officials; and (3) non homicide crimes like espionage and treason.” *Id.* at 1210.

192. See DPIC, *Federal Laws Providing for the Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=192> (last visited Jan. 17, 2004).

193. The FDPA only created twenty crimes. Two of these crimes are written into § 3591(b)(1)-(2) and eighteen of them are interspersed throughout Chapter 18 of the United States Code. Boettcher, *supra* note 184, at 1059.

eligible.”¹⁹⁴ For example, the FDPA transformed carjacking into a capital crime by adding the death penalty as the maximum punishment and not by changing the elements of carjacking.¹⁹⁵

The statutory scheme of the FDPA expands the scope of the federal death penalty and provides the procedure for death penalty cases.¹⁹⁶ Before the Government may proceed with a capital case, several threshold conditions must exist. The crime must be one described in 18 U.S.C. §§ 794,¹⁹⁷ 2381,¹⁹⁸ or 21 U.S.C. § 841(c)(1),¹⁹⁹ or “any other offense for which a sentence of death is provided.”²⁰⁰ Also, the requisite level of intent must be found beyond a reasonable doubt.²⁰¹ If the threshold requirements are met, the Government must provide the defendant with notice of its intent to seek the death penalty.²⁰²

Section 3593(b) sets forth the procedures for the trial.²⁰³ That section requires a bifurcated proceeding, which means that the sentencing hearing is distinct from the guilt or innocence stage.²⁰⁴ Section 3593 also provides procedures for the use of aggravating and mitigating evidence at the sentencing hearing.²⁰⁵ At the sentencing hearing, “information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or re-

194. *Id.*

195. See George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 328 (1996).

196. “Prior to the enactment of the FDPA, the death penalty could not be imposed even where it previously had been approved because Congress had not established procedures for its imposition that were consistent with the Supreme Court’s death penalty jurisprudence. The FDPA filled this gap.” *United States v. Frank*, 8 F. Supp. 2d 253, 258 (S.D.N.Y. 1998).

197. 18 U.S.C. § 3591(a)(1) (2000).

198. 18 U.S.C. § 3591(a)(1).

199. 18 U.S.C. § 3591(b)(1)-(2).

200. 18 U.S.C. § 3591(a)(2).

201. 18 U.S.C. § 3591(a)(2)(A)-(D). The provision states:

(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

Id. These threshold requirements serve to narrow the class of death eligible defendants.

202. Notice to proceed as a capital case must be provided within “a reasonable time before the trial or before acceptance by the court of a plea of guilty.” 18 U.S.C. § 3593(a) (2000). This notice must state that the circumstances of the crime justify a death sentence and that the government will seek the death sentence. 18 U.S.C. § 3593(a)(1). The notice must also provide the aggravating factors that the government will prove at sentencing if the defendant is convicted. 18 U.S.C. § 3591(a)(2).

203. 18 U.S.C. § 3593(b)(2)(A)-(D).

204. 18 U.S.C. § 3593(b).

205. *Id.*

quired to be considered under Section 3592.”²⁰⁶ The jury may consider nonstatutory aggravating factors, as long as the Government provides the defendant with notice of its intent to prove such factors.²⁰⁷ To meet its burden, the Government must prove aggravating factors beyond a reasonable doubt²⁰⁸ to a unanimous jury.²⁰⁹ If no aggravating factor is found, the death penalty may not be imposed.²¹⁰ The defendant must prove mitigating factors by a preponderance of the information.²¹¹ Only one juror is required to find a mitigating factor in order to establish it.²¹² A relaxed evidentiary standard applies to both parties at the sentencing hearing.²¹³ The sentencer must balance the aggravating factors against the mitigating factors before it can impose a death sentence.²¹⁴ The sentencer must refrain from considering race, color, gender, religious beliefs, or national origin of the defendant or of a victim during its sentencing deliberations.²¹⁵

206. 18 U.S.C. § 3593(c). The defendant may present any information that is relevant to a mitigating factor, but the government is limited to presenting aggravating factors as to which it gave defendant notice. *Id.*

207. “The use of such nonstatutory factors is encouraged to tailor the prosecution to the facts of the case.” Cutler, *supra* note 158, at 1212.

208. *Id.*

209. 18 U.S.C. § 3593(d).

210. *Id.*

211. 18 U.S.C. § 3593(c).

212. 18 U.S.C. § 3593(d). 18 U.S.C. § 3592(a)(1)-(8) lists mitigating factors that the defendant can present to the sentencer to militate against a sentence of death. The list is by no means exclusive, as the eighth enumerated factor is open-ended. The eighth factor enables the defendant to present “[o]ther factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.” 18 U.S.C. § 3592(a)(8) (2000).

213. 18 U.S.C. § 3593(c) states: “Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” In *United States v. Jones*, the Fifth Circuit Court of Appeals interpreted the impact of the relaxed evidentiary standard in these terms: “[T]he defendant and the government may introduce any relevant information during the sentencing hearing limited by the caveat that such information be relevant, reliable, and its probative value must outweigh the danger of unfair prejudice.” *United States v. Jones*, 132 F.3d 232, 241 (5th Cir. 1998). The evidentiary standard resembles the standard from FED. R. EVID. 403, except that Rule 403 provides that evidence may be excluded if its probative value is “substantially outweighed” by the danger of unfair prejudice, whereas the FDPA does not include the “substantially” qualification.

214. The statute requires the sentencer to

consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

18 U.S.C. § 3593(e)(3).

215. 18 U.S.C. § 3593(f). One provision that did not make it into the FDPA was the Racial Justice Act. The Racial Justice Act did not garner enough legislative support to be written into the language of the FDPA. The Racial Justice Act

2. *The FDPA in the Courts*

Aside from *Quinones* and *Fell*, courts have ubiquitously affirmed the constitutionality of the FDPA. What follows is a brief survey of those decisions. In *Jones v. United States*²¹⁶ the Supreme Court upheld a federal capital defendant's conviction and death sentence by holding that a defendant in a federal death penalty case was not entitled to an instruction regarding the consequences of jury deadlock and that the Eighth Amendment did not require the jury to be instructed as to its failure to come to a unanimous decision.²¹⁷ Further, a plurality of the Court rejected the defendant's claims that certain nonstatutory aggravating factors were vague, overbroad, and duplicative.²¹⁸ The scope of the Court's review was relatively narrow, but in affirming the death sentence, the Court implicitly upheld the constitutionality of the statute.²¹⁹

Lower federal courts have considered challenges to the FDPA beyond the issues presented in *Jones*. Many challenges to the FDPA and sentences imposed under it question the validity of nonstatutory and statutory aggravating factors. Nonstatutory aggravating factors do not

would have required a statistical inquiry into the implementation of the death penalty, focusing on any disparity in the number of members of a particular race who are executed compared to the race of all defendants. The amendment would have allowed an inference of discrimination to be established by showing disparity, which would have then shifted the burden to the government to show nonracial factors to explain the disparities.

Cutler, *supra* note 158, at 1215-16.

216. *Jones v. United States*, 527 U.S. 373 (1999).

217. *Id.* at 376, 381-82.

218. *Id.* at 395-402. The defendant claimed that two nonstatutory aggravating factors were unconstitutionally duplicative. These factors were: "Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas" and "Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family." See *United States v. Jones*, 132 F.3d 232, 250 (5th Cir. 1998). The Supreme Court held that the phrase "personal characteristics" from the latter nonstatutory aggravating factor does not necessarily include those characteristics enumerated in the former nonstatutory aggravating factor. *Jones*, 527 U.S. at 398-99. Any risk of a skewed weighing process was cured by the district court's limiting instruction. *Id.* at 399-400. The Court held that the district court improperly concluded that the factors at issue were vague. *Id.* at 400. Applying a deferential standard, the Court construed an understandable "core meaning" in the factors, which passed constitutional muster. *Id.* The nonstatutory aggravating factors were not overbroad because the specific evidence that the government elicited to support them was unique to the case. *Id.* at 401-02.

219. Certiorari was granted on three questions:

[W]hether petitioner was entitled to an instruction as to the effect of jury deadlock; whether there is a reasonable likelihood that the jury was led to believe that petitioner would receive a court-imposed sentence less than life imprisonment in the event that they could not reach a unanimous sentence recommendation; and whether the submission to the jury of two allegedly duplicative, vague, and overbroad nonstatutory aggravating factors was harmless error.

Id. at 375-76.

violate the Ex Post Facto Clause²²⁰ of the U.S. Constitution.²²¹ Courts have denied challenges alleging that nonstatutory aggravating factors violate the nondelegation doctrine.²²² Related to the nondelegation issue, courts have concluded that nonstatutory aggravating factors do not involve unbridled and unconstitutional exercises of prosecutorial discretion.²²³ Courts have generally upheld specific nonstatutory aggravating factors against arguments that they are unconstitutionally vague,²²⁴ but have also struck nonstatutory aggravating factors that lack specificity or reliability.²²⁵ Courts have also upheld specific statutory aggravating factors against challenges that they are unconstitutionally vague.²²⁶ Claims of duplication or potential duplication of

220. U.S. CONST. art. I, § 9, cl. 3.

221. *United States v. Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000); *United States v. Glover*, 43 F. Supp. 2d 1217, 1229-30 (D. Kan. 1999); *United States v. Frank*, 8 F. Supp. 2d 253, 267 (S.D.N.Y. 1998); *United States v. McVeigh*, 944 F. Supp. 1478, 1486 (D. Colo. 1996); *United States v. Nguyen*, 928 F. Supp. 1525, 1537-38 (D. Kan. 1996); *United States v. Davis*, No 01-282 SEC-TION "R"(1), 2003 U.S. Dist. LEXIS 5745, at *43-45 (E.D. La. Apr. 9, 2003).

222. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *Frank*, 8 F. Supp. 2d at 266-67; *Glover*, 43 F. Supp. 2d at 1229; *United States v. Cuff*, 38 F. Supp. 2d 282, 287 (S.D.N.Y. 1999); *United States v. Miner*, 176 F. Supp. 2d 424, 430-31 (W.D. Pa. 2001); *United States v. O'Driscoll*, 203 F. Supp. 2d 334, 346 (M.D. Pa. 2002); *United States v. Sampson*, 275 F. Supp. 2d 49, 98-102 (D. Mass. 2003).

223. *Cooper*, 91 F. Supp. 2d at 100; *Frank*, 8 F. Supp. 2d at 260.

224. *United States v. Kee*, No S1 98 CR 778 (DLC), 2000 U.S. Dist. LEXIS 8785 at *17 (S.D.N.Y. June 27, 2000) (nonstatutory aggravating factor of future dangerousness is not invalid per se); *O'Driscoll*, 203 F. Supp. 2d at 339, 345 (nonstatutory aggravating factors of victim impact statements and "future dangerousness" are appropriate for the jury to consider); *United States v. Lentz*, 225 F. Supp. 2d 666, 670-71 (E.D. Va. 2002) (nonstatutory aggravating factor "[o]ther offenses and threatened offenses" is not unconstitutionally overbroad); *Sampson*, 275 F. Supp. 2d at 108-09 (nonstatutory aggravating factor involving future dangerousness of the defendant is not unconstitutionally vague).

225. *Cuff*, 38 F. Supp. 2d at 288 (The government may not use the use of a firearm as a nonstatutory aggravating factor because "[u]se of a firearm in connection with a homicide does not meet that predicate for the simple reason that use of a firearm does not, in any rational sense, make a homicide worse, whether one looks at it from the standpoint of the crime, the victim, or the perpetrator."); *United States v. Friend*, 92 F. Supp. 2d 534 (E.D. Va. 2000) (The district court struck a nonstatutory aggravating factor, which concerned a threat to kill a witness that the incarcerated defendant allegedly made that was overheard by another inmate, because it failed to meet relevance and heightened reliability requirements.); *Glover*, 43 F. Supp. 2d at 1224-27 (Nonstatutory aggravating factor that included the phrases "serious physical and emotional injury," "permanent harm to the family" of a victim, "substantial" as a modifier of "premeditation," and "lack of remorse," was not unconstitutionally vague, yet required further specificity.); *United States v. Gilbert*, 120 F. Supp. 2d 147, 150-55 (D. Mass. 2000) (Using a three-prong standard, which requires nonstatutory aggravating factors to be reliable, relevant, and more probative than prejudicial, the court examined each of the government's proposed "other acts" and barred some on the grounds that they lacked reliability or the requisite gravity for a capital case; the court allowed other acts. The court also determined that the government's future danger arguments were irrelevant and lacked sufficient gravity.).

226. *Kee*, 2000 U.S. Dist. LEXIS 8785, at *16-17 (aggravating factor of substantial planning and mediation is not unconstitutionally vague.); *Miner*, 176 F. Supp. 2d at 438 (Section

aggravating factors and elements of the underlying crime have generally been denied.²²⁷

Courts have consistently denied claims that the FDPA does not comport with the Supreme Court's capital punishment jurisprudence. Courts have held that the FDPA does not unconstitutionally limit the presentation of mitigating evidence.²²⁸ Courts have also held that the FDPA genuinely narrows the class of death-eligible capital defendants²²⁹ and that it does not violate the Indictment Clause²³⁰ in light of

3592(c)(6) (2000), a factor that covers offenses committed in an "especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim" is not vague.); *accord Nguyen*, 928 F. Supp. at 1533-34; *Frank*, 8 F. Supp. 2d at 277; *United States v. Webster*, 162 F.3d 308, 354-57 (5th Cir. 1998); *Minerd*, 176 F. Supp. 2d at 438 (concerning § 3592(c)(9), "the defendant committed the offense after substantial planning and premeditation to cause the death of a person" is not vague.); *accord Frank*, 8 F. Supp. 2d at 278; *McVeigh*, 944 F. Supp. at 1490; *O'Driscoll*, 203 F. Supp. 2d at 344-45; *United States v. Barnette*, 211 F.3d 803, 819 (4th Cir. 2000) (language, "grave risk," the statutory aggravating factor from § 3592(c)(5), is not unconstitutionally vague.); *United States v. Matthews*, 246 F. Supp. 2d 137, 148 (N.D.N.Y. 2002) (Section 3592(c)(8) does not need to be interpreted in a manner "only to apply to murder for hire or murder to gain an inheritance or life insurance proceeds"; the term "substantial" from § 3592(c)(9) is not unconstitutionally vague; the language "especially heinous, cruel, or depraved manner" is not unconstitutionally vague when "cured by the limitation in the statute that the offense involve torture or serious physical abuse."); *Sampson*, 275 F. Supp. 2d at 103-04 (Statutory aggravating factors involving the "heinous, cruel, or depraved manner" of the crime; "substantial planning and premeditation to cause the death of a person"; and the age and vulnerability of the victim are not unconstitutionally vague.).

227. *Kee*, 2000 U.S. Dist. LEXIS 8785, at *35-36 (intent factors of § 3591(a)(2) do not present prejudicial duplication); *Minerd*, 176 F. Supp. 2d at 440-41 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988), which establishes that narrowing of the death eligible class can occur at either the guilt/innocence or penalty phase); *Lentz*, 225 F. Supp. 2d at 669-70 (statutory aggravating factor under § 3591(c)(1), "[death] occurred during the commission of another crime," does not duplicate elements of the underlying kidnapping offense); *United States v. Johnson*, 136 F. Supp. 2d 553, 559 (W.D.Va. 2001); *United States v. Bin Laden*, 126 F. Supp. 2d 290, 301 (S.D.N.Y. 2001). *But see McVeigh*, 944 F. Supp. at 1489-90 (The government is prohibited from introducing "those offenses as aggravating factors that duplicate the crimes charged in the indictment. To allow the jury to weigh as an aggravating factor a crime already proved in a guilty verdict would unfairly skew the weighing process in favor of death."); *Glover*, 43 F. Supp. 2d at 1221-23 (The government could not use as a statutory aggravating factor that the defendant "knowingly created a grave risk of death to more than one person" (§ 3592(c)(16)) and the statutory aggravating factor "the defendant attempted to kill more than one person." (§ 3592(c)(5)). The district court also struck the government's first nonstatutory aggravating factor, which it found to be impermissibly duplicative of the first two statutory aggravating factors dealing with mental state.).

228. *Cooper*, 91 F. Supp. 2d at 101-02; *United States v. Webster*, 162 F.3d 308, 355-56 (5th Cir. 1998) (noting that "the guillotine must be as color-blind as is the Constitution" and that precluding the consideration of "race, color, religious beliefs, national origin, or sex of the defendant or of any victim" as a mitigating factor (§ 3593(f)) does not invalidate the FDPA because, under the Equal Protection Clause, race cannot be considered as a mitigating nor an aggravating factor).

229. *Cooper*, 91 F. Supp. 2d at 95-97; *Cuff*, 38 F. Supp. 2d at 287; *Minerd*, 176 F. Supp. 2d at 437-38.

230. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury.").

Ring.²³¹ The FDPA appellate review procedures have passed scrutiny.²³² The FDPA is not so incomprehensible that it prevents jurors from making reasoned sentencing decisions.²³³ The weighing provision of § 3593(e) is not unconstitutional.²³⁴ Challenges based on claims of selective prosecution have failed.²³⁵ Further, courts have generally rejected defendants' attempts to force the Government to disclose details of its decision-making processes.²³⁶ There is, however, no consensus on the defendant's right to allocution under the FDPA.²³⁷ Courts have held that the relaxed evidentiary standard of § 3593(c) is consistent with the Supreme Court's position that a sentencing jury should receive as much evidence as possible in order to make an individual sentencing determination.²³⁸ Further, the lack of

231. *Cooper*, 91 F. Supp. 2d at 103-04 (The FDPA does not violate the indictment clause by allowing the government to give notice of the intent element rather than the grand jury charging the intent element in an indictment.); *Matthews*, 246 F. Supp. 2d at 146 (The FDPA is not unconstitutional because it does not "expressly state that the aggravating factors are elements of the offense to be charged by the Grand Jury."); *United States v. Sampson*, 245 F. Supp. 2d 327, 338 (D. Mass. 2003) (*Ring* does not invalidate the FDPA; "it only requires that the grand jury perform its traditional function concerning facts that are now deemed to be elements, or the functional equivalent of elements, of offenses for which Congress has decided the death penalty can be imposed.").

232. *Cooper*, 91 F. Supp. 2d at 98-100; *Frank*, 8 F. Supp. 2d at 270; *Cuff*, 38 F. Supp. 2d at 285-86 (lack of mandatory appellate review is not unconstitutional); *O'Driscoll*, 203 F. Supp. 2d at 342-43 (A weighing statute can use nonstatutory aggravating factors without providing for mandatory comparative proportionality review.); *Glover*, 43 F. Supp. 2d at 1230-31 (no requirement for proportionality review); *United States v. Hammer*, 226 F.3d 229, 236-37 (3d Cir. 2000) (FDPA does not require a mandatory appeal and it is within a court's discretion to grant or deny a defendant's motion to dismiss an appeal.).

233. *Kee*, 2000 U.S. Dist. LEXIS 8785, at *8; *United States v. Llera Plaza*, 179 F. Supp. 2d 444, 450 n.5 (E.D. Pa. 2001).

234. *Minerd*, 176 F. Supp. 2d at 436-37.

235. *Id.* at 443; *United States v. Minerd*, 182 F. Supp. 2d 459 (W.D. Pa. 2002); *O'Driscoll*, 203 F. Supp. 2d at 341.

236. *Kee*, 2000 U.S. Dist. LEXIS 8785, at *10-11, 12-13 (The court did, however, order an *in camera* review of documents, which allegedly showed that the defendant did not personally commit the murder. The defendant claimed that these documents were not submitted to the Attorney General.); *Frank*, 8 F. Supp. 2d at 283-84; *Minerd*, 182 F. Supp. 2d 459; *United States v. Bass*, 536 U.S. 862 (2002) (reversing Sixth Circuit decision (266 F. 3d 532 (6th Cir. 2001)) granting discovery into the government's capital charging practices).

237. *United States v. Gabrion*, 2002 U.S. Dist. LEXIS 1379, at *3-6 (W.D. Mi. Jan. 25, 2002) (It is better practice to allow a capital defendant to allocate before a jury, without holding that a capital defendant has a right to allocution. However, allocution is limited to pleas for mercy or expressions of remorse and is not permitted for presenting disputed factual issues.).

238. See *United States v. Fell*, 360 F.3d 135, 143-44 (2d Cir. 2004); *Jones*, 132 F.3d at 241-42 (citing *Lowenfield*, 484 U.S. at 238-39; *Gregg*, 428 U.S. at 204). *United States v. Allen* held that the relaxed evidentiary standard worked to the defendant's favor and that the standard prevented the introduction of overly prejudicial evidence. *United States v. Allen*, 247 F.3d 741, 759-60 (8th Cir. 2001), *vacated by* 536 U.S. 953 (2002).

explicit standards governing the exclusion of evidence does not render the FDPA unconstitutional.²³⁹

E. Holding the FDPA Unconstitutional: United States v. Quinones and United States v. Fell

In holding the FDPA unconstitutional, *Quinones* and *Fell* embody the conflict created by the increased awareness of flaws in capital punishment systems and the Court's position that the death penalty is not per se unconstitutional. This section summarizes *Quinones* and *Fell*.

I. United States v. Quinones

Alan Quinones and Diego B. Rodriguez are two alleged heroin dealers who were accused of killing Edwin Santiago, a government informant.²⁴⁰ Quinones and Rodriguez are the only two of eight defendants who were charged under the FDPA.²⁴¹ Unlike their eight codefendants, Quinones and Rodriguez did not plead guilty.²⁴² The Government's case rested heavily on the testimony of several accomplices.²⁴³ The local U.S. Attorney did not initially recommend seeking the death penalty against Quinones and Rodriguez. However, Attorney General John Ashcroft "ordered the local prosecutors to seek the death penalty against both defendants."²⁴⁴

At a pretrial motions conference, Judge Jed S. Rakoff requested the parties brief him on the issue of whether a "form of penalty that precludes forever rectification of errors that go to actual innocence [is] a form of penalty that accords with the Constitution."²⁴⁵ Judge Rakoff asked the parties to consider the issue of wrongful capital convictions in light of the "common knowledge" of the number of wrongful capital convictions and subsequent exonerations.²⁴⁶ Judge Rakoff observed that this issue, once "a fairly remote hypothetical," was "neither a hypothetical nor so remote."²⁴⁷

239. *United States v. McVeigh*, 153 F.3d 1166, 1212 (10th Cir. 1998); *United States v. Gabrion*, No. 1:99-CR-76, 2002, U.S. Dist. LEXIS 1379, at *4-6 (W.D. Mi. Jan. 25, 2002).

240. See *Quinones*, 313 F.3d 49, 53 (2d Cir. 2002); Devlin Barrett, *New York Federal Court Declares Death Penalty Unconstitutional*, at <http://www.commondreams.org/headlines02/0701-07.htm> (last visited Mar. 2, 2004).

241. *United States v. Quinones*, 196 F. Supp. 2d 416, 419 (S.D.N.Y. 2002).

242. *Id.*

243. *United States v. Quinones*, 205 F. Supp. 2d at 260 n.14.

244. Brief for Appellant at 14, *Quinones*, 313 F.3d 49 (2d Cir. 2002) (No. 02-1403(L)), available at <http://deathpenaltyinfo.org/QuinonesBrief.pdf> (last visited Apr. 22, 2004).

245. See *Quinones*, 313 F.3d at 53.

246. *Id.*

247. *Id.* at 54.

In a pretrial motion, the defendants argued that the FDPA is unconstitutional because, in light of the high number of wrongful convictions, it violates due process by terminating a person's ability to establish his or her actual innocence.²⁴⁸ Citing high rates of wrongful convictions and the significant number of death row exonerations, the defendants argued that capital punishment is prone to error.

a. The Preliminary Order

On April 25, 2002, Judge Rakoff indicated that he would hold the FDPA unconstitutional.²⁴⁹ He emphasized that executing an innocent person and thus eliminating that person's ability to establish his or her innocence is unconstitutional.²⁵⁰ To support that conclusion, Judge Rakoff cited Justice O'Connor's concurring opinion in *Herrera v. Collins*:

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—contrary to contemporary standards of decency, shocking to the conscience, or offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental—the execution of a legally and factually innocent person would be a constitutionally intolerable event.²⁵¹

Judge Rakoff acknowledged the dramatic changes in the general perception of the fairness and reliability of capital punishment.²⁵² According to Judge Rakoff, *Herrera's* assumption that the high burdens of proof, procedural protections, judicial review, postconviction remedies, and executive clemency make the execution of an innocent person unlikely was no longer tenable.²⁵³ For the court, one of the most important developments that undermined *Herrera's* assumption that the system did not convict innocent people was DNA testing.²⁵⁴ Since *Herrera*, Judge Rakoff observed, twelve death row inmates, "some of whom came within days of being executed,"²⁵⁵ were exonerated due

248. Judge Rakoff emphasized that his request for briefs was not an invitation for motions: I want to stress again, I am not inviting any motion, and I am certainly not indicating any view of the court as to any particular point of view or argument. I just simply raised that because the court, like counsel, would benefit from being educated as to everything that is relevant to a death penalty case.

Id.

249. *Quinones*, 196 F. Supp. 2d at 420-21.

250. *Id.* at 416.

251. *Id.* at 416-17 (quoting *Herrera v. Collins*, 506 U.S. 390, 420 (1993)) (O'Connor, J., concurring) (internal quotation marks omitted).

252. *Id.* at 417.

253. *Id.*

254. *Id.*

255. *Quinones*, 196 F. Supp. 2d at 417.

to DNA evidence that established their innocence. Judge Rakoff observed that DNA is not a panacea to the problem of wrongful convictions.²⁵⁶ In the vast majority of cases, DNA testing is not available because of the absence of testable biological material.²⁵⁷ Still, Judge Rakoff was so persuaded by the DNA exonerations that he asserted there is an inevitable inference that "numerous innocent people have been executed whose innocence might otherwise have been similarly established, whether by newly-developed scientific techniques, newly-discovered evidence, or simply renewed attention to their cases."²⁵⁸

The Government contended that *Herrera* foreclosed the defendants' argument. Judge Rakoff rejected that claim.²⁵⁹ Because the defendants challenged the FDPA in a pretrial motion, they still carried the presumption of innocence, unlike Leonel Herrera, who had been convicted and had challenged his death sentence through a petition for a writ of habeas corpus. After distinguishing *Herrera*, Judge Rakoff identified language from the majority opinion, which asserted that while a stand-alone claim of actual innocence is not sufficient to warrant habeas relief, the Court assumed *arguendo* "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."²⁶⁰ That recognition of the value of a showing of actual innocence, albeit a truly persuasive showing, combined with the language of Justice O'Connor's crucial concurring opinion, diminished the persuasiveness of the assertion that a stand alone-claim of actual innocence is not a constitutional claim.²⁶¹ Thus, according to Judge Rakoff, *Herrera* did not control because it was procedurally distinct and also because the substantive assumption that innocent people were not convicted and sentenced to death was no longer valid.²⁶² Judge Rakoff concluded that executing innocent persons without providing them the ability to prove their innocence violates due process.²⁶³ After concluding that capital punishment systems have failed to distinguish the innocent from the guilty, that the risk of executing innocents was too substantial, and that eliminating such persons' rights to prove their innocence constituted a due process violation, Judge Rakoff offered the Govern-

256. *Id.* at 418.

257. *Id.*

258. *Id.*

259. *Id.* at 419.

260. *Id.* (quoting *Herrera*, 506 U.S. at 417).

261. *Quinones*, 196 F. Supp. 2d at 417.

262. *Id.* at 420.

263. *Id.*

ment an opportunity to address the court's views on this "matter of such importance."²⁶⁴

b. The Final Order

The Government filed additional briefs to persuade Judge Rakoff that the FDPA was not unconstitutional.²⁶⁵ After considering those arguments, Judge Rakoff rejected the Government's positions and, consistent with his preliminary order, held that the FDPA unconstitutionally violated due process. Judge Rakoff observed that two conditions make it "fully foreseeable"²⁶⁶ that innocent people will be executed. First, recent findings demonstrate that innocent people are frequently sentenced to death. Second, evidence establishing the innocence of these wrongfully convicted persons does not emerge until long after the convictions.²⁶⁷ Judge Rakoff opined that due process is not a static concept; instead, it "must be interpreted in light of evolving standards of fairness and ordered liberty."²⁶⁸ Because a meaningful number of innocent people will be executed who would thus be deprived of the opportunity to prove their innocence, the "implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process."²⁶⁹

After clarifying the grounds of the decision, Judge Rakoff addressed the Government's arguments. The Government first argued that the case was not ripe for adjudication because the defendants had

264. *Id.* at 420-21.

265. In its brief the Government argued:

(1) [T]he constitutionality of the death penalty was not ripe for adjudication prior to trial because, should the jury fail to convict the defendants or decline to impose the death penalty, no question of the FDPA's constitutionality would present itself; (2) the Supreme Court's decision in *Herrera v. Collins*, which held that a claim of actual innocence based on newly-discovered evidence is not a ground for federal habeas relief absent an allegation of some constitutional error, foreclosed the District Court's proposed holding; and (3) the District Court's proposed determination that a substantial number of innocent persons will be executed under the FDPA is wrong because (a) the defendants adduced no evidence that innocent people have been, or are likely to be, executed under the federal death penalty system, and (b) the advent of DNA testing has significantly reduced the risk of erroneous convictions in the future.

Quinones, 313 F.3d at 54-55 (internal citation omitted).

266. *Quinones*, 205 F. Supp. 2d at 257.

267. *Id.* at 257.

268. *Id.* at 260. To support this view of the Due Process Clause, Judge Rakoff cited *Planned Parenthood v. Casey*, 505 U.S. 833, 846-51 (1992) and *Rochin v. California*, 342 U.S. 165, 171-72 (1952).

269. *Quinones*, 205 F. Supp. 2d at 257.

not been sentenced, much less convicted of a capital crime.²⁷⁰ Judge Rakoff found the case ripe for review based on the consequences that a capital charge creates.²⁷¹ One significant consequence is that the Government has greater latitude to "shape the jury to its preference than would otherwise be the case" because jurors in capital cases must be death qualified.²⁷² According to Judge Rakoff, any postponement would cause "material prejudice to the defendants."²⁷³

In its second point, the Government argued that due process was not violated because the framers, Congress, and the Supreme Court "all accepted the constitutionality of administering capital punishment despite the inherent fallibility of the judicial system."²⁷⁴ Judge Rakoff countered that the plain language of the Due Process Clause²⁷⁵ only indicated that the framers intended to extend the guarantee of due process to all proceedings, not that they endorsed a specific deprivation, such as the death penalty.²⁷⁶ Further, there is no indication that the framers accepted the execution of a meaningful number of innocent people.²⁷⁷

Judge Rakoff wrote that Congress did not consider the risk of sentencing innocents to death when it enacted the FDPA in 1994, contrary to the Government's contention.²⁷⁸ In any event, Judge Rakoff opined, even if Congress believed that the value of deterrence outweighed the interests of innocent people wrongfully convicted and executed, such an act is beyond Congress's power.²⁷⁹ An innocent person has a substantial liberty interest in avoiding conviction and execution and that liberty interest includes the "right of an innocent person not to be deprived, by execution, of the opportunity to

270. *Id.* at 257.

271. *Id.* at 258.

272. *Id.* The composition of the jury in a capital case is fundamentally different from that of a jury in a noncapital case. Potential jurors who are opposed to the death penalty or hold views that would substantially impair imposing a death sentence may be excused for cause. *See* *Wainwright v. Witt*, 469 U.S. 412 (1985). The Government can afford to strike potential jurors that express even the slightest reservation about the death penalty because it is guaranteed at least twenty peremptory challenges. In noncapital cases, the government only has six peremptory challenges. The pending death penalty ensures that people who would be qualified to sit on a noncapital jury would not be impaneled on a capital jury.

273. *Id.* at 259.

274. *Id.*

275. No person "shall be deprived of life, liberty, or property without due process of the law." U.S. CONST. amend. V.

276. *Quinones*, 205 F. Supp. 2d at 259.

277. *Id.*

278. *Id.* at 260.

279. *Id.* at 261.

demonstrate his innocence.”²⁸⁰ Absent a compelling governmental interest, Judge Rakoff wrote, Congress cannot violate that interest.²⁸¹

Judge Rakoff then turned to the Government’s contention that *Herrera* is “fatal to defendants’ motion.”²⁸² Consistent with the preliminary order, Judge Rakoff interpreted the core holding of *Herrera* to assert “a belated or successive habeas petitioner must make a persuasive showing of actual innocence to warrant habeas relief.”²⁸³ The high threshold for this showing does not apply to a pretrial motion because the interest of finality is absent.²⁸⁴ Further, Chief Justice William H. Rehnquist’s assertion that “a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional” was supported by the concurring opinions of Justice O’Connor²⁸⁵ and Justice Byron White.²⁸⁶ Judge Rakoff asserted that *Herrera* ultimately established that “executing the innocent is forbidden by the Constitution”²⁸⁷ and thus supported, instead of foreclosed, the FDPA’s unconstitutionality.²⁸⁸

In its third argument, the Government claimed that the evidence upon which Judge Rakoff based his holding was “either unreliable, irrelevant, or both.”²⁸⁹ The Government argued that evidence of exonerations does not apply to the FDPA because there have been no exonerations from federal death row.²⁹⁰ Judge Rakoff explained that the Government’s argument lacked merit because the number of defendants sentenced to death under the FDPA is much smaller than the number of capital defendants sentenced to death under state statutes.²⁹¹ More importantly, an average period from seven to ten years elapsed between conviction and exoneration for each individual exon-

280. *Id.*

281. *Id.*

282. *Quinones*, 205 F. Supp. 2d at 261.

283. *Id.* at 263.

284. See *Herrera v. Collins*, 506 U.S. 390, 417-18 (1993) (quoting *United States v. Johnson*, 327 U.S. 106, 112 (1946)) (considering the affidavits presented by defendant and asserting that “defendants often abuse new trial motions as a method of delaying enforcement of just sentences”) (internal quotation marks omitted).

285. *Id.* “The execution of a legally and factually innocent person would be a constitutionally intolerable event.” *Herrera*, 506 U.S. at 419 (O’Connor, J., concurring).

286. “I assume that a persuasive showing of ‘actual innocence’ made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.” *Herrera*, 506 U.S. at 429 (White, J., concurring).

287. *Quinones*, 205 F. Supp. 2d at 263.

288. *Id.* at 264.

289. *Id.*

290. *Id.* at 266.

291. *Id.* At the time of the opinion, there were 31 defendants sentenced to death under the FDPA and a pool of 800 to 3,700 defendants sentenced to death under state statutes. *Id.*

erated from death row; therefore, it was too early for exonerations from federal death row to occur.²⁹²

Judge Rakoff also rejected the Government's argument that the FDPA will prevent wrongful convictions. Due to several federal practices, Judge Rakoff argued that wrongful convictions under the FDPA may be even more likely than under state death penalty regimes.²⁹³ Judge Rakoff opined that the availability of pretrial DNA testing may reduce some mistaken convictions, but this does not change the reality that there is a "remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases."²⁹⁴ Judge Rakoff observed that at least twenty death row exonerations were due to reasons other than DNA.²⁹⁵

Judge Rakoff concluded by acknowledging that his decision would be "critically scrutinized."²⁹⁶ Still, he reiterated that the high rate of wrongful convictions, combined with long delays before errors are revealed, "compels the conclusion that execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings."²⁹⁷

c. The Second Circuit Reverses

Despite Judge Rakoff's emphatic conclusion, the United States Court of Appeals for the Second Circuit reversed his decision.²⁹⁸ The Second Circuit found the challenge to the FDPA ripe for review because it was a pure question of law²⁹⁹ and because the defendants

292. *Quinones*, 205 F. Supp. 2d at 266.

293. Judge Rakoff observed that federal practice allows for capital convictions based on uncorroborated accomplice or co-operator testimony, but many states do not permit conviction based on this testimony. *Id.* Similarly, federal practice "treats circumstantial evidence identically to direct evidence and permits conviction based solely on such evidence," but most states do not. *Id.* at 267. Also, federal courts give more deference than state courts to eyewitness testimony, a leading cause of wrongful convictions. *Id.* In *Sampson*, Judge Wolf disagreed with the Government's position that findings of error in state court proceedings were inapposite to the FDPA. See *United States v. Sampson*, 275 F. Supp. 2d 49, 78-81 (2003). He emphasized that federal judges and jurors were just as fallible as their state counterparts and also discussed federal cases involving wrongful convictions due to prosecutorial misconduct. *Id.*

294. *Quinones*, 205 F. Supp. 2d at 264.

295. *Id.* at 265.

296. *Id.* at 268.

297. *Id.*

298. *Quinones*, 313 F.3d at 52-53.

299. *Id.* at 59.

would suffer hardship if judicial review were to be withheld.³⁰⁰ The court emphasized that Supreme Court precedent, in particular *Gregg* and *Herrera*, foreclosed the defendants' claims.³⁰¹ Because it held that the death penalty was not per se unconstitutional, *Gregg* mooted all Eighth Amendment-based arguments to the contrary.³⁰² Further, "the language of the Due Process Clause itself recognizes the possibility of capital punishment," which foreclosed the due process claims.³⁰³ The Second Circuit concluded that only the Supreme Court was authorized to make any changes in this area of the law.³⁰⁴

Based on the plain language of the Due Process Clause, the Second Circuit rejected the district court's due process analysis.³⁰⁵ The court then asserted that the district court erred when it used the "evolving standards" basis to discern the meaning of due process.³⁰⁶ According to the Second Circuit, the "evolving standards" test applies only to the Cruel and Unusual Punishment Clause of the Eighth Amendment.³⁰⁷ The court posited that the proper due process analysis was the fundamental rights standard.³⁰⁸ Under that standard, a law is unconstitutional only when it violates a fundamental right.³⁰⁹ "[H]istorical practice" determines if a claimed right is fundamental.³¹⁰ The court interpreted the defendants' argument to be that "the continued opportunity to exonerate oneself throughout the natural course of one's life" was fundamental.³¹¹ The court held that this argument expressed no fundamental right; thus, the FDPA did not violate due process.³¹² The most important indication that the defendants' claim was not fundamental was that the Supreme Court had upheld capital punishment

300. *Id.* In addition to the potential hardship that stems from a death-qualified jury, the court observed that the death penalty exerts extra pressures on defendants to secure plea agreements. *Id.*

301. *Id.* at 53.

302. *Id.*

303. *Id.*

304. *Quinones*, 313 F.3d at 69.

305. *Id.* The court recognized that the defendants' due process argument sounded in substantive due process because it contended, "constitutional error lies in the act of execution itself." *Id.* at 61 n.9.

306. *Id.*

307. *Id.*

308. *Id.* at 52.

309. The court used language set forth in *Rochin v. California* to delimit the scope of fundamental rights. A fundamental right is defined as "some principle of justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Quinones*, 313 F.3d at 62 (quoting *Rochin v. California*, 342 U.S. 165, 171-72 (1952)).

310. *Id.* (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43-44 (1996)) (internal quotation marks omitted).

311. *Id.*

312. *Id.* at 52.

statutes "despite a clear recognition of the possibility that . . . innocent people might be executed and, therefore, lose any opportunity for exoneration."³¹³ The court interpreted the concurring opinions of Justices Brennan and Thurgood Marshall in *Furman* so that they denied the existence of a fundamental right "to the opportunity for exoneration during one's natural life."³¹⁴

The Second Circuit also disagreed with Judge Rakoff's position that the defendants presented an issue of first impression. It stated that precedent and historical acceptance of capital punishment squarely controlled the issue that the defendants presented.³¹⁵ The "theoretical possibility that a defendant might be innocent" did not provide the grounds necessary to invalidate the FDPA.³¹⁶ Contrary to the district court's conclusion, the Second Circuit asserted that *Herrera's* assumption that "a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional" was not essential to the holding,³¹⁷ and that in declining habeas relief, *Herrera* essentially asserted "that there is no fundamental right to the opportunity for exoneration even before one's execution date, much less during the entire course of one's natural lifetime."³¹⁸ In dictum, the Second Circuit asserted that even if *Furman*, *Gregg*, and *Herrera* did not control the issue presented, *Chapman v. United States*³¹⁹ foreclosed the defendants' fundamental right argument.³²⁰ Because the Supreme Court held that capital punishment was not per se unconstitutional and because the defendants did not contend that the FDPA made arbitrary distinctions or was arbitrarily applied, *Chapman* dictated that the FDPA could not constitute a per se due process violation.³²¹

313. *Id.* at 65.

314. *Id.* at 67.

315. According to the court, nations that have accepted capital punishment have also accepted the risk of executing innocent people. The Court cited a range of authorities that recognized that innocent people have been executed. *Quinones*, 313 F.3d at 62-66. Congress, prior to enacting the FDPA, heard "extensive evidence in support of the argument that innocent individuals might be executed." *Id.* at 64. The Court interpreted Congress's enactment of the FDPA as further support that the continued right to prove one's innocence was not fundamental. *Id.* at 64-65.

316. *Id.* at 69.

317. *Id.* at 68.

318. *Id.* at 69.

319. *Chapman v. United States*, 500 U.S. 453 (1991).

320. *Quinones*, 313 F.3d at 69-70.

321. *Id.*

The Second Circuit also issued a brief opinion denying the defendants' petition for a rehearing.³²² The defendants argued that a panel rehearing was necessary because the court had failed to understand their argument, the district court's opinions, and controlling Supreme Court cases.³²³ The Second Circuit clarified the analysis it used to reverse the district court and disagreed with the defendants' criticisms of its opinion.³²⁴ According to the Second Circuit, the district court did not invalidate the FDPA because of any specific unconstitutional procedure and, therefore, the district court essentially declared that the death penalty was per se unconstitutional, in direct contravention of Supreme Court precedent.³²⁵ The court also defended its interpretation of the defendants' argument, which it construed as a request to declare the death penalty unconstitutional per se.³²⁶

2. United States v. Fell

a. The District Court's Decision

Before *Quinones* was reversed, another district court in the Second Circuit held the FDPA unconstitutional. Judge William K. Sessions³²⁷ declared the FDPA unconstitutional on grounds entirely distinct from those that Judge Rakoff adopted. Judge Sessions held that the FDPA was unconstitutional because it allowed for the imposition of a death sentence based on aggravating factors that were not subject to the guarantees of confrontation and cross-examination, which violated the Sixth Amendment and the Due Process Clause.³²⁸

Before Donald Fell was indicted for the abduction and murder of Teresca King,³²⁹ he and federal prosecutors agreed to a tentative plea

322. *United States v. Quinones*, 317 F.3d 86 (2d Cir. 2003). The defendants petitioned for panel rehearing on December 24, 2002. *Id.* at 88.

323. *Id.* at 89-90.

324. The defendants contended that the Court of Appeals "misunderstood their argument, the opinion of the District Court, and various controlling Supreme Court cases." *Id.* at 88.

325. Specifically, the Court of Appeals interpreted the district court's opinions to hold that the "authorization of capital punishment for certain crimes" was unconstitutional. *Id.* at 88. Also contributing to this conclusion was the fact that the district court's analysis was framed in terms of the "death penalty," rather than the FDPA. *Id.*

326. *Id.* at 91. According to the Court, by not arguing that any "particular terms or procedures of the FDPA" were constitutionally infirm, the defendants essentially argued that capital punishment was unconstitutional per se.

327. Interestingly, Judge Sessions is a member of the National Committee to Prevent Wrongful Executions. Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 348 (2002).

328. *Fell*, 217 F. Supp. 2d 469, 490 (D. Vt. 2002).

329. Counts 1 and 2 of a four count indictment charged Fell with carjacking and kidnapping, both with death resulting. *Id.* at 473.

agreement.³³⁰ But in January 2002, Attorney General Ashcroft ordered the local prosecutors to abandon the plea agreement and to seek the death penalty against Fell.³³¹ On January 30, 2002, the Government filed its "Notice of Intent to Seek the Death Penalty." On July 8, 2002, the grand jury returned a superceding indictment that found that the requisite threshold criteria were met.³³² On the same day as the grand jury's superceding indictment, the government filed a "Supplemental Notice of Intent to Seek Death Penalty," which gave notice of the four nonstatutory aggravating factors it intended to prove.³³³ In a pretrial motion, Fell motioned the court to declare the FDPA unconstitutional on twelve separate grounds.³³⁴ On July 23,

330. See Sullivan, *supra* note 31, at 39-40. Under the plea agreement, Fell would have served a sentence of life imprisonment without parole. *Id.* at 39. The plea agreement was based on mitigating factors including, "Fell's remorse, his age, his history of drug problems, his lack of criminal activity, and his willingness to cooperate by leading officials to the victim's body." *Id.* at 40.

331. *Id.*

332. The grand jury found the "intentional" requirement from § 3591(a)(2) was met. The grand jury also found three statutory aggravating factors: (1) § 3592(c)(1) the death occurred during the commission of the crime of kidnapping; (2) § 3592(c)(6) Fell's behavior was especially heinous, cruel or depraved that it involved serious physical abuse to the victim; and (3) § 3592(c)(16) Fell intentionally killed or attempted to kill more than one person in a single criminal episode. *Fell*, 217 F. Supp. 2d at 473.

333. These nonstatutory aggravating factors were:

(1) Fell participated in King's abduction to facilitate his escape from the area in which he and an accomplice had committed a double murder; (2) that he participated in King's murder to prevent her from reporting the kidnapping and carjacking; (3) that King's murder was part of substantial premeditation involved in committing the crime of carjacking; and (4) that Fell caused loss, injury and harm to King and her family.

Id.

334. Fell sought to declare the FDPA unconstitutional because:

(1) [I]t fails to avoid sentences of death for the factually and legally innocent; (2) the FDPA's sentencing scheme is incomprehensible to a jury, in violation of the Fifth and Sixth Amendments; (3) the FDPA fails to narrow adequately the class of persons eligible for the death penalty, in violation of the Eighth Amendment; (4) the relaxed evidentiary standard applicable to the penalty phase of trial renders any findings unconstitutional; (5) the indictment fails to charge a capital crime; (6) a jury's consideration of non-statutory aggravating factors permits the arbitrary and capricious imposition of a sentence of death, in violation of the Eighth and Fourteenth Amendments; (7) the FDPA's delegation to the government of the power to define aggravating factors violates separation of powers principles and the non-delegation doctrine, in violation of Article I, § 1; (8) its delegation to the government of the power to define non-statutory aggravating factors after the crime but before trial violates the *ex post facto* clause; (9) the FDPA is internally inconsistent, precluding the use of non-statutory factors; (10) the use of non-statutory aggravating factors without providing for proportionality review is unconstitutional; (11) the death penalty is under all circumstances cruel and unusual punishment in violation of the Eighth Amendment; (12) the death penalty violates binding international law.

Id. at 473-74.

2002, after the Supreme Court decided *Ring*, Fell filed a supplemental motion and argued that *Ring* rendered the FDPA unconstitutional.³³⁵

Judge Sessions acknowledged that the Bill of Rights established capital punishment as an acceptable form of punishment.³³⁶ But, accompanying that recognition is “the need for more rigorous or scrupulous procedure,” which is a direct result of the fact that death is a unique form of punishment.³³⁷ Citing *Gardner v. Florida*,³³⁸ Judge Sessions asserted that if the procedures of a death penalty statute reduce the reliability of the sentence, a court may strike the statute down on due process grounds.³³⁹ Judge Sessions continued and stated that while the Supreme Court has never held that all procedural rights are required at capital sentencing, capital sentencing procedures must be reevaluated “against evolving standards of procedural fairness in a civilized society.”³⁴⁰

After establishing that the Due Process Clause requires heightened reliability in capital sentencing provisions, Judge Sessions analyzed the validity of the FDPA in light of § 3593(c), which abrogates the rules of evidence at the sentencing hearing.³⁴¹ He first detailed the stages of a capital proceeding, and then explained the meaning of the *Jones*, *Apprendi*, and *Ring* line of cases and its affect on the FDPA. The central proposition of these cases is:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.³⁴²

That rule applies when the fact at issue is an element of a crime, rather than a sentencing factor. Sentencing factors do not need to be proven beyond a reasonable doubt; neither must they be heard in a manner consistent with the rules of evidence.³⁴³ In *Apprendi*, the Court held that any fact that increases the sentence beyond that authorized by a jury “is the functional equivalent of an element of a greater offense

335. *Id.* at 490.

336. *Id.* at 474.

337. *Id.*

338. *Gardner v. Florida*, 430 U.S. 349 (1977).

339. *Fell*, 217 F. Supp. 2d. at 476.

340. *Id.* at 477 (quoting *Gardner*, 430 U.S. at 357) (internal quotation marks omitted).

341. *Id.*

342. *Id.* at 480 (quoting *United States v. Jones*, 526 U.S. 227, 233 n.6 (1999)) (internal quotation marks omitted).

343. *Id.* at 478-79.

than the one covered by the jury's guilty verdict."³⁴⁴ Such a fact "fits squarely within the usual definition of an element of the offense."³⁴⁵

Judge Sessions then looked at the structure of the FDPA. He noted that the FDPA "authorizes both features of a traditional trial and features of a traditional sentencing."³⁴⁶ The FDPA requires sentencing hearings to follow procedures from trial, such as proof beyond a reasonable doubt; however, it specifically renounces the rules of evidence, which draws it closer to a traditional sentencing hearing.³⁴⁷ According to Judge Sessions, the FDPA looks like a sentencing statute with sentencing factors, but these factors also resemble elements of a separate capital offense.³⁴⁸ If either the aggravating factor or the mental state is not found, then the jury is only authorized to impose life in prison. Judge Sessions emphasized that the statutory aggravating factors "expose[d] Fell to a punishment (the death penalty) greater than that otherwise legally prescribed (life imprisonment)" and were thus the functional equivalents of elements.³⁴⁹

Judge Sessions argued that the controlling question is not one of form, but rather one of effect. Instead of asking what trial rights are required at sentencing, the inquiry should be, "what rights are required at a proceeding at which facts are found that equate to offense elements?"³⁵⁰ By phrasing the question in that manner, Judge Sessions navigated past the principle that due process rights have limited application at sentencing.³⁵¹ Due to the trial procedures present³⁵² and the elements rule, Judge Sessions contended that the FDPA sentencing hearing had features of a trial and a sentencing hearing.³⁵³ Judge Sessions relied on *Specht v. Patterson*³⁵⁴ and *Bullington v. Missouri*³⁵⁵ to support his argument that the FDPA sentencing hearing is essentially a distinct trial.³⁵⁶ Ultimately, Judge Sessions observed, the "FDPA's procedure for determining death eligibility defies labeling

344. *Fell*, 217 F. Supp. 2d at 481 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)) (internal quotation marks omitted).

345. *Id.*

346. *Id.* at 483.

347. *Id.*

348. *Id.* at 482.

349. *Id.* at 483.

350. *Fell*, 217 F. Supp. 2d. at 486.

351. See *Williams v. New York*, 337 U.S. 241 (1949).

352. These features included the Government having the burden to prove an aggravating factor beyond a reasonable doubt and the requirement that a unanimous jury must find an aggravating factor.

353. *Fell*, 217 F. Supp. 2d at 482-83.

354. *Specht v. Patterson*, 386 U.S. 605 (1967).

355. *Bullington v. Missouri*, 451 U.S. 430 (1981).

356. *Fell*, 217 F. Supp. 2d at 486-89.

either as sentencing or as trial”;³⁵⁷ but because at the sentencing hearing “the penalty of life imprisonment can be converted to a death sentence”³⁵⁸ after facts that are the functional equivalents of elements of the offense are found, therefore, due process requires “procedural rights that will ensure the highest degree of reliability in the fact-finding process.”³⁵⁹

Judge Sessions concluded that the relaxed evidentiary standard of § 3593(c) is inconsistent with the requirement for heightened reliability in capital cases.³⁶⁰ The evidence the Government intended to use against Fell to prove the statutory aggravating factors included a statement allegedly made by Fell’s deceased codefendant.³⁶¹ Had the FDPA not abrogated the rules of evidence, this statement would have been inadmissible hearsay.³⁶² Judge Sessions dismissed the Government’s argument that the rules of evidence were not required at the sentencing hearing on the grounds that adopting such an argument “would approve death eligibility as the federal criminal justice system’s sole exception to the practice of requiring that offense elements be proven by admissible evidence comporting with due process and fair trial guarantees.”³⁶³ Admitting this evidence would also violate Fell’s Sixth Amendment rights to confrontation and cross-examination.³⁶⁴ Because the FDPA’s procedures allowed for less reliability when the Constitution requires heightened reliability in capital sentencing, Judge Sessions held the statute unconstitutional.³⁶⁵ In an emphatic manner similar to that of Judge Rakoff in the second *Quinones* opinion, Judge Sessions concluded with the observation: “Capital punishment is under siege.”³⁶⁶

b. The Second Circuit Reverses

On March 2, 2004, the Second Circuit Court of Appeals reversed the district court decision.³⁶⁷ The validity of the § 3593(c) evidentiary standard was the core issue before the court.³⁶⁸ Prior to reaching that

357. *Id.* at 487.

358. *Id.* at 488.

359. *Id.*

360. *Id.* at 485.

361. *Id.*

362. *Fell*, 217 F. Supp. 2d at 485.

363. *Id.* at 488.

364. Judge Sessions argued that the Sixth Amendment’s right to confrontation applies at sentencing because the language of the Amendment refers to “all criminal prosecutions.” *Id.* at 486.

365. *Id.* at 489.

366. *Id.* at 490.

367. *United States v. Fell*, 360 F.3d 135 (2d Cir. 2004).

368. *Id.* at 137.

concern, the court raised the issue of the ripeness of Fell's challenge.³⁶⁹ Neither Fell nor the Government addressed that issue.³⁷⁰ Quoting extensively from its discussion of ripeness in *Quinones*, the court concluded that, as in *Quinones*, Fell's challenge was ripe.³⁷¹

Unlike the district court's analysis, the Second Circuit limited the reach of the *Jones*, *Apprendi*, and *Ring* line of cases. The court observed that the FDPA was in "literal compliance with the mandates of *Ring* and *Apprendi*" because it required a jury to consider if aggravating factors have been proven beyond a reasonable doubt.³⁷² The Second Circuit agreed with the district court that capital cases must meet standards of heightened reliability.³⁷³ But it disagreed with the district court's conclusion that imposing the rules of evidence was necessary to attain those standards.³⁷⁴ According to the Second Circuit, "in order to achieve such "heightened reliability," more evidence, not less, should be admitted on the presence of aggravating and mitigating factors."³⁷⁵ The court cited *Gregg and Williams v. New York* to support the position that sentencing bodies require as much information as possible about the defendant.³⁷⁶ Because the FDPA's relaxed evidentiary standard admitted more evidence, the Second Circuit concluded that the FDPA promoted heightened reliability rather than undermined it, as Fell and the district court contended. By admitting more evidence, the FDPA facilitated "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."³⁷⁷

The Second Circuit also found that the district court erred by effectively equating the rules of evidence with personal constitutional rights.³⁷⁸ The court emphasized that there is no constitutional right to the rules of evidence.³⁷⁹ Further, the court found that the § 3593(c) evidentiary standard adequately ensured fair trials and was constitutional, particularly "given that the balancing test set forth in the FDPA is . . . more stringent than its counterpart in the FRE."³⁸⁰ Finally, the Second Circuit emphasized that trial judges retain the func-

369. *Id.* at 139.

370. *Id.*

371. *Id.* at 139-40.

372. *Id.* at 142.

373. *Fell*, 360 F.3d at 143.

374. *Id.*

375. *Id.*

376. *Id.* at 144.

377. *Id.* (quoting *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)).

378. *Id.*

379. *Fell*, 360 F.3d at 144.

380. *Id.* at 145.

tion of gatekeepers “to ensure that unconstitutional evidence otherwise admissible under applicable evidentiary rules is excluded from trial.”³⁸¹

III. ANALYSIS

Prior to analyzing how *Quinones* and *Fell* apply the Due Process Clause, subpart III(A) provides a brief overview of the historical application of the Due Process Clause in capital cases. Subpart III(B)³⁸² defends the district court’s *Quinones* decisions and analyzes the application of substantive due process in the context of capital punishment. That section analyzes the significance of innocence in capital cases and also argues that the Second Circuit erred. Subpart III(C)³⁸³ argues that *Fell* is decided correctly because it properly applies the “elements rule” in the context of the FDPA sentencing hearing, which is in essence a distinct criminal prosecution. That section discusses how the Second Circuit failed to view the sentencing stage as a trial on the issue of capital guilt.

A. Due Process Challenges to the Death Penalty

The vast majority of challenges to capital punishment statutes are based on the Cruel and Unusual Punishment Clause of the Eighth Amendment.³⁸⁴ *Quinones* and *Fell* do not follow this set route and instead apply the Due Process Clause of the Fifth Amendment to declare the FDPA unconstitutional. But, like cases based on the Eighth Amendment, *Quinones* and *Fell* recognize that death is different and observe the mandate that capital punishment proceedings maintain a heightened degree of reliability.

Quinones and *Fell* also interpret the meaning of due process in a manner that resembles the hallmark Eighth Amendment “evolving standards of decency that mark the progress of a maturing society”³⁸⁵ standard. *Quinones* and *Fell* view due process as a flexible concept, which is not a new perspective.³⁸⁶ *Gardner v. Florida* instructs that courts analyzing capital sentencing statutes for procedural infirmities

381. *Id.* To illustrate this point, the Second Circuit described how the district court would be obligated exclude the statements made by *Fell*’s codefendant upon a finding that those statements would “unfairly prejudice *Fell*.” *Id.*

382. See *infra* notes 423-581 and accompanying text.

383. See *infra* notes 584-766 and accompanying text.

384. See *supra* notes 153-171 and accompanying text.

385. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

386. Indeed, widening of due process protections in all contexts has been described as “one of the great features of its development.” *MOTT*, *supra* note 7, at 604.

have the "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society."³⁸⁷ Thus, the due process evolving standards paradigm ensures procedural fairness and the Eighth Amendment standard determines if a particular punishment offends contemporary standards of decency. The analyses may have different goals, but they overlap and reject the notion that the meanings of the clauses are inflexible and impervious to reinterpretation. A brief overview of several United States Supreme Court decisions in which the Due Process Clause is used to challenge the death penalty sketches the origins of *Quinones* and *Fell*.

Prior to *Furman*, the Due Process Clause was applied in large part because the Court refused to entertain arguments that the death penalty violated the Cruel and Unusual Punishment Clause.³⁸⁸ In *Furman*, the Court used the Due Process Clause of the Fourteenth Amendment to apply the Cruel and Unusual Punishment Clause to the states.³⁸⁹ The Court used the Due Process Clause in the same

387. *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

388. See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("In *McGautha* the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments.") (internal citation omitted). In *McGautha v. California*, the Court held that standardless jury sentencing did not violate the Due Process Clause of the Fourteenth Amendment. 402 U.S. 183, 221-22 (1971). Subsequent cases applying the Due Process Clause show that *McGautha* did not foreclose the use of the Due Process Clause to invalidate death sentences or capital punishment systems. Instead of closely scrutinizing what due process required, the Court has reviewed the historical treatment of jury discretion in capital cases to arrive at its conclusion, which *Furman* substantially undercut. Similarly, *McGautha's* companion case, reported sub nom *Crampton v. Ohio*, held that a unitary proceeding did not violate due process of law. *Gregg* essentially invalidated that conclusion. The *McGautha* dissent criticized the majority for misapprehending the petitioner's due process argument. *Id.* at 248-49 (Brennan, J., dissenting). The dissent also argued that due process could allow for flexible sentencing procedures and respect individual rights. *Id.* at 254-55 (Brennan, J., dissenting). The majority failed to factor the Due Process Clause's concern with individual rights. That is the essential notion that drives the application of due process in *Quinones* and *Fell*. Further, "*McGautha* only addressed—and explored the history relevant to—the due process limits on jury discretion in making the ultimate sentencing decision, not the due process limitations on judicial discretion in fashioning and interpreting the guilt and sentencing phase procedures leading up to that decision." Thurschwell, *supra* note 12, at 17. Earlier due process challenges to capital punishment similarly failed. See, e.g., *Francis v. Resweber*, 329 U.S. 459 (1947) (no due process violation to attempt to execute a defendant after the first execution failed due to a mechanical malfunction of the electric chair).

389. See *Furman*, 408 U.S. at 240. The Court granted the three petitions for certiorari "limited to the question whether the imposition of the execution of the death penalty constitute cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the States by the Fourteenth." *Id.* (Douglas, J., concurring). "That the requirements of due process ban cruel and unusual punishment is now settled." *Id.* at 241 (Douglas, J., concurring). "The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process

manner in *Woodson v. North Carolina*³⁹⁰ and *Roberts v. Louisiana*.³⁹¹ While not insignificant, the application of the Due Process Clause in these early cases was limited.

The Court has applied the Due Process Clause to vacate individual death sentences when procedural errors deny fair trials. Many due process challenges to death sentences relate to conduct at trial that prevents capital defendants from confronting, denying, or explaining information presented by the prosecution or considered by the judge. The seminal case on this issue is *Gardner v. Florida*.³⁹²

In *Gardner*, the jury found that mitigating evidence outweighed aggravating evidence and suggested life imprisonment; however, the trial judge relied on information from a confidential presentence investigation to override the jury and sentence the defendant to death.³⁹³ The Supreme Court held the "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."³⁹⁴ The Court emphasized that procedural due process concerns controlled: "We conclude the procedure does not satisfy the constitutional command that no person shall be deprived of life without due process of law."³⁹⁵ The due process violation reduced the reli-

Clause of the Fourteenth Amendment." *Id.* at 251 n.1 (Brennan, J., concurring); see also Beth S. Brinkman, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 354 (1984).

390. See *Woodson v. North Carolina*, 428 U.S. 280, 287 n.8 (1976) ("The Eighth Amendment's proscription of cruel and unusual punishments has been held to be applicable to the States through the Fourteenth Amendment.") (citation omitted). The precise role of due process in *Woodson* is not entirely clear. The majority specified that the issue "involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." *Id.* at 287. The emphasis on "procedure" sounds like due process. However, in *Gardner*, Justice White explained that *Woodson* "expressly rested" on the "Eighth Amendment's ban on cruel and unusual punishments," rather than the Due Process Clause. See *Gardner*, 430 U.S. at 363-64 (White, J., concurring in the judgment). In his *Woodson* dissent, then Justice Rehnquist criticized the Court's application of due process in addition to the Eighth Amendment:

What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed. This is squarely contrary to *McGautha*, and unsupported by any other decision of this Court.

Woodson, 428 U.S. at 324 (Rehnquist, J., dissenting). Justice Rehnquist's observation verifies that due process had an identifiable role in the holding.

391. See *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

392. *Gardner v. Florida*, 430 U.S. 349 (1977).

393. *Id.* at 351-52.

394. *Id.* at 362.

395. *Id.* at 351.

ability at trial, an intolerable occurrence in capital proceedings.³⁹⁶ *Gardner* established a new role for due process in capital cases, one that blends the Eighth Amendment concerns for heightened reliability with due process concerns for procedural fairness.

In *Skipper v. South Carolina*, a due process violation occurred when the jury was prevented from considering relevant mitigating evidence; that violation led the Court to overturn a death sentence.³⁹⁷ In *Skipper*, the prosecution argued that the death sentence was appropriate because of the defendant's future dangerousness.³⁹⁸ To rebut this argument, the defendant attempted to introduce the mitigating testimony of two jailers and a regular visitor to the jail.³⁹⁹ Believing that such testimony was "irrelevant and hence inadmissible," the trial court prevented the defendant from introducing that testimony.⁴⁰⁰ Relying on *Lockett v. Ohio*⁴⁰¹ and *Eddings v. Oklahoma*,⁴⁰² the Supreme Court held that the trial court "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender."⁴⁰³ Justice Byron White emphasized that due process functioned in tandem with *Lockett* and *Eddings*:

Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.⁴⁰⁴

Thus, *Gardner's* concern for due process played as much a role in invalidating the death sentence as did *Lockett* and *Eddings*. The concurring Justices agreed that the exclusion of testimony violated due process;⁴⁰⁵ however, they faulted the use of *Lockett* and *Eddings* and

396. In addressing the state's argument that disclosing information in the confidential report would hamper future presentence investigations, the Court observed: "[O]n the other hand, if [the sentencing report] is the basis for a death sentence, the interest in reliability plainly outweighs the state's interest in preserving the availability of comparable information into their cases." *Id.* at 359.

397. 476 U.S. 1 (1986).

398. *Id.* at 3.

399. *Id.*

400. *Id.*

401. *Lockett v. Ohio*, 438 U.S. 586 (1978).

402. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

403. *Skipper*, 476 U.S. at 8.

404. *Id.* at 5 n.1 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)) (internal quotation marks omitted).

405. *Id.* at 10 (Powell, J., concurring in judgment).

thus the Eighth Amendment, because those cases required that all relevant mitigating evidence pertaining to the crime or the character of the defendant at the time of the crime be considered, but not behavior following arrest.⁴⁰⁶

In *Simmons v. South Carolina*,⁴⁰⁷ the Court vacated a death sentence because it was based on information that the defendant was prevented from denying or explaining.⁴⁰⁸ The trial judge prevented the defendant from instructing the jury that he was parole ineligible because of South Carolina's "three strikes rule."⁴⁰⁹ The defendant wanted to use this instruction to rebut the prosecution's argument that the jury should consider his future dangerousness when setting the punishment.⁴¹⁰ The Court agreed with the defendant's argument and held that when the prosecution puts the defendant's future dangerousness at issue, "and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."⁴¹¹ The Court analogized the defendant's inability to confront the prosecution's future dangerousness argument with the situations in *Gardner* and *Skipper*.⁴¹² In *Gardner*, *Skipper*, and *Simmons*, specific trial procedures prevented the capital defendants from presenting crucial evidence, which violated due process. The Eighth Amendment played only a peripheral role in these cases.⁴¹³

406. *Id.* at 13-15 (Powell, J., concurring in judgment).

407. *Simmons v. South Carolina*, 512 U.S. 154 (1994).

408. *Id.* at 161.

409. The defendant was thus prevented from explaining to the jury that if it sentenced him to life imprisonment instead of imposing the death penalty, there was no chance that he would ever leave prison. *Id.* at 159-60.

410. *Id.* at 157. The defendant was also wary that the jury could misconstrue life imprisonment to signify that the defendant could sometime be eligible for parole. *Id.* at 158.

411. *Id.* at 156. The *Simmons* due process analysis is still a viable method to attack individual death sentences. *Simmons* has been affirmed in subsequent cases. See *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Kelly v. South Carolina*, 534 U.S. 246 (2002). However, the scope of *Simmons*' applicability has been narrowed in *O'Dell v. Netherland*, 521 U.S. 151 (1997) (holding that *Simmons* is a "new" court-made rule and is not retroactive) and *Ramdass v. Angelone*, 530 U.S. 156 (2000) (holding that habeas petitioner was not entitled to relief under *Simmons* because at the time the jury considered his sentence, he was eligible for parole).

412. *Simmons*, 512 U.S. at 164-65.

413. Concurring in *Simmons*, Justices Souter argued that the Eighth Amendment should have taken a more prevalent role in the decision. *Simmons*, 512 U.S. at 172-74 (Souter, J., concurring). That argument highlights a perceived intersection between the Eighth Amendment and due process guarantees for a fair trial. Justice Souter opined that "[t]he Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed." *Id.* at 172 (Souter, J., concurring). That argument also stems from the Eighth Amendment's mandate that there be a "heightened standard for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* (quoting *Woodson*, 428 U.S. at 305) (internal quotation marks omitted). The Eighth Amend-

The Due Process Clause is not relegated only to challenges involving the ability to present specific information in capital cases. In *Lankford v. Idaho*, the lack of notice rose to the level of a due process violation and warranted that the death sentence be vacated.⁴¹⁴ In *Presnell v. Georgia*, the Court vacated a death sentence when the jury's sentence was based on underlying charges that the jury had not properly convicted the defendant of committing.⁴¹⁵ In *Green v. Georgia*, the trial judge violated due process when he excluded hearsay evidence that would have established that the defendant was not the actual murderer.⁴¹⁶ In *Beck v. Alabama*, the Court once again drew on *Gardner* and held that withholding from the jury instructions on a lesser-included offense charge in a capital case violated due process.⁴¹⁷ In *Morgan v. Illinois*⁴¹⁸ the due process right to have an impartial jury vacated a death sentence when the trial judge prevented the defendant from questioning the venire if they would impose the death penalty regardless of the facts of the case.⁴¹⁹

These cases demonstrate that the Due Process Clause has been used to challenge death sentences and also show the limits of the applicability of the clause. Never has the Court declared an entire capital pun-

ment also requires "accurate sentencing information" that "invalidates procedural rules that tend to diminish the reliability of the sentencing determination." *Id.* (quoting *Beck v. Alabama* 447 U.S. 625, 638 (1980)) (internal quotation marks omitted). When the jury is prevented from hearing information essential for making a choice between sentencing alternatives, the death sentence "should be vacated as having been arbitrarily or discriminatorily and wantonly and freakishly imposed." *Simmons*, 512 U.S. at 173 (quoting *Furman v. Georgia*, 408 U.S. 238, 249 (1972)) (internal quotation marks and ellipses omitted).

414. *Lankford v. Idaho*, 500 U.S. 110 (1991). In both *Gardner* and *Lankford*, the death sentence was based on information that was essentially kept secret from the defense. *Id.* at 126. In *Lankford*, the prosecution advised the defendant and the court that the death penalty would not be sought. *Id.* at 111. At the conclusion of the trial, the judge imposed the death penalty. The prosecution and judge's silence as to the death penalty during the trial deprived the defendant of notice that the death penalty would be imposed.

415. *Presnell v. Georgia*, 439 U.S. 14, 15 (1978). The Court explicitly applied the rule of *Gardner*: "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Id.* at 16.

416. *Green v. Georgia*, 442 U.S. 95, 97 (1979).

417. *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). The Court concluded that refusing to instruct the jury on a lesser-included offense essentially transformed the statute into a mandatory death sentence that *Woodson* and *Roberts* proscribe. *Id.* at 630. Here the Eighth Amendment and the Due Process Clause intersect; the procedural infirmity of the statute creates an Eighth Amendment violation. Conversely, when due process is not violated here, neither is the Eighth Amendment's prohibition of mandatory death sentences.

418. *Morgan v. Illinois*, 504 U.S. 719 (1992).

419. In *Morgan*, the due process violation at *voir dire* poisoned the entire trial because the presence of aggravating and mitigating factors is irrelevant to a "juror [who] has already formed an opinion on the merits." *Id.* at 729. The Court found "decisions dealing with capital sentencing juries . . . most analogous" to the issue before it. *Id.* at 728.

ishment statute unconstitutional based solely on due process grounds. Invalidating statutes and declaring classes of people ineligible for the death penalty is the province of the Eighth Amendment.⁴²⁰ Even though the application of due process in the capital context is relatively limited, as the cases above illustrate, due process imports the central tenets of the Eighth Amendment, namely the concern for heightened reliability in capital sentencing and the evolving standards analysis.

As with each case discussed above, *Quinones* and *Fell* exemplify a Due Process Clause that is not fixed, frozen, or inflexible, but is instead reexamined in light of evolving standards of procedural fairness.⁴²¹ That flexible application of the Due Process Clause is a necessary step in effectuating the Clause's original meaning as a check on governmental authority, a purpose one author has described as such:

There is no doubt that the Fifth Amendment was expected to limit arbitrary abuses of the powers of government from whatever source abuse might come, and it is a perfectly tenable hypothesis that the

420. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (Executing a defendant for an offense less than murder violates the Eighth Amendment.); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Executing a defendant who was under sixteen at the time the offense was committed violates the Eighth Amendment.); *Ford v. Wainwright* 477 U.S. 399 (1986) (Executing an insane person violates the Eighth Amendment.); *Atkins v. Virginia*, 536 U.S. 304 (2002) (Executing a mentally retarded person violates the Eighth Amendment.).

421. See *Griffin v. Illinois*, 351 U.S. 12, 20-21 (Frankfurter, J., concurring in the judgment):

[D]ue process is, perhaps the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of due process nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy.

Id.; see also *Lankford*, 500 U.S. at 121 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 at 162-63 (1951)) (internal quotation marks omitted) (Frankfurter, J., concurring):

The requirement of “due process” is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But “due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id.

due process provision was intended to serve as a general limitation to check tyranny in any kind of case in which it should arise.⁴²²

Quinones and *Fell* broaden the scope of the Due Process Clause in the capital setting by applying it as a safeguard against the risks of an arbitrary sentencing scheme, instead of only as the foundation to an objection of an individual death sentence.

B. Quinones

The significant number of wrongly convicted individuals exonerated from death row served as a factual basis for the defendants' due process argument. They argued, that, based on the wrongful capital convictions, the FDPA cannot distinguish between the innocent and the guilty and thus created a substantial risk of wrongful convictions and executions. The Second Circuit ignored that factual basis when it rephrased the defendants' argument as one that advocates for a "fundamental right to a continued opportunity for exoneration throughout the course of one's natural life"⁴²³ and a declaration that the death penalty was unconstitutional per se.⁴²⁴ According to the Second Circuit, even if there were problems with capital punishment, precedent prevents courts from declaring it unconstitutional.⁴²⁵ That conclusion

422. MOTT, *supra* note 7, at 159.

423. United States v. Quinones, 313 F.3d 49, 52 (2d Cir. 2002).

424. *Id.* at 89.

425. The sharply opposed majority and dissenting opinions in *People v. Bull*, 705 N.E.2d 824 (Ill. 1998), present an interesting analogue to the disagreement between the district court and the Second Circuit. In *Bull*, a capital defendant sentenced to death raised a series of issues, one of which was a facial challenge to the Illinois death penalty statute. *Id.* at 832. The defendant argued that the Illinois death penalty statute was unconstitutional because of the inevitability of wrongful convictions and the irreversibility of the punishment. *Id.* at 839. The majority noted that capital punishment is fallible because it is operated by humans; however, it cited *Gregg* and asserted that capital punishment is not per se unconstitutional. *Id.* at 840. In response to the state's position that adequate procedural safeguards existed, the defendant contended that "no amount of procedural due process can prevent all of the errors that can result in an innocent person being convicted of a capital crime." *Id.* at 841. The majority interpreted this claim to be a "strident protest" against the criminal trial "as a means of determining the guilt or innocence of an accused." *Id.* at 840. This protest was unanswerable because mistakes have, and will continue to be made, and American criminal law "provides the maximum protection necessary to guard against mistakes being made." *Bull*, 705 N.E.2d at 842. Further, the majority observed that legislative judgments were due deference and that the defendant's argument was "emphatically a question for the legislature." *Id.* at 847. Justice Moses W. Harrison II dissented from the decision to uphold the defendant's death sentence. He argued that the Illinois death penalty system "is not working." *Id.* at 847 (Harrison, J., concurring in part and dissenting in part). Justice Harrison argued that the number of exonerations (at the time the case was decided there were nine exonerations in Illinois) evidenced the unreliability and thus unconstitutionality of the Illinois death penalty statute. *Id.* Wrongful convictions and executions are inevitable, Justice Harrison argued. *Id.* at 848. Unlike Judge Rakoff, Justice Harrison merely concluded that wrongful convictions violated the Eighth and Fourteenth Amendments of the U.S. Constitution and article I, section 2 of the Illinois Constitution without providing any analysis. *Id.* The man-

is incorrect because, as another district court considering the constitutionality of the FDPA observed, “[T]he Supreme Court has never decided whether the risk of executing innocent individuals renders the death penalty unconstitutional.”⁴²⁶

The purpose of a criminal justice system is to determine guilt and to punish the guilty.⁴²⁷ In light of the disturbing number of wrongful convictions and subsequent exonerations, death penalty systems have failed to make that essential distinction. As *Quinones* contends, wrongful capital convictions serve as compelling and undeniable evidence that the death penalty is prone to error. Further, the constitutional mandate for heightened reliability and the guarantees of due process render this system, as currently administered, unconstitutional.

1. *Due Process in Quinones*

A fundamental concern for protecting the innocent is at the core of the district court’s opinions.⁴²⁸ The district court’s reliance on both procedural and substantive due process⁴²⁹ appears to distinguish between legal and actual innocence, but this is not the case. The substantive due process violation occurs when an innocent person is executed, regardless if he or she was legally or factually innocent. The procedural due process violation is twofold: ineffective procedural safeguards exist to prevent wrongful convictions, and the nature of the

ner in which the majority in *Bull* and the Second Circuit addressed the challenges based in large part on the substantial risk of wrongful executions is similar. Both courts relied on *Gregg*, deference to legislature, and confidence in existing procedures to reject the challenges presented. These analyses enabled the courts to sidestep the issue of wrongful convictions.

426. *United States v. Sampson*, 275 F. Supp. 2d 49, 55 (D. Mass. 2003).

427. “After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)).

428. Innocence in the capital context involves actual innocence and legal innocence. *See generally*, *Sawyer v. Whitley*, 505 U.S. 333 (1992). Death penalty systems fail to ensure that the actually innocent and legally innocent escape conviction and execution. *See Clarke et al., supra* note 93 at 317-18. In the capital context, innocence has several identifiable meanings—actual, factual, and legal innocence. Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975 (2002). The three different meanings of innocence in a death penalty illustrate the interdependence of procedural and substantive rights. A capital defendant can be actually innocent of the charge alleged by the prosecution. *Id.* at 975-77. In this context, the capital defendant actually did not murder the victim. *Id.* A capital defendant can also be innocent of a capital crime or innocent of the death penalty. *Id.* 977-79. When one is innocent of a capital crime, he is not actually innocent of the crime itself; however, the crime itself does not rise to a statutorily defined capital defense. *Id.* When one is innocent of the death penalty, he is guilty of the capital crime, but aggravation is not sufficient or mitigating factors outweigh the aggravation. *Id.* at 979-82.

429. *See United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002).

punishment itself eventually forecloses any chance to establish one's actual or legal innocence. Fleshing out the relationship between substantive rights and the want of procedural protections helps illustrate their interdependence.

One's right not to be executed when innocent creates its own procedural protections that are not present in noncapital cases. Without these procedural protections, the right not to be executed when innocent is of limited value.⁴³⁰ A cognizable claim of actual innocence has absolutely no legal meaning without proper procedural safeguards and the opportunity to express that claim. Additionally, a claim of legal innocence requires increased procedural protections.⁴³¹ The mandate for heightened reliability in capital cases must create more expansive procedural protections that protect both the legally and factually innocent.

A core disagreement between the district court and the Second Circuit involves interpreting the scope of due process. The district court stressed that due process is not a static concept and that it "must be interpreted in light of evolving standards of fairness and ordered liberty."⁴³² The Second Circuit asserted that due process must be interpreted according to the fundamental rights standard.

a. Due Process as an Evolving Concept

Specific language from *Herrera* provides sound support for a substantive due process argument based on a claim of actual innocence in a capital case.⁴³³ In her concurring opinion, Justice O'Connor men-

430. See Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 508 (1996) ("The substantive right not to be executed if innocent is empty unless accompanied by a procedural means of determining innocence.").

431. See also *id.* at 504-08 (arguing that procedures must be in place to ensure that substantive due process right not to be executed when innocent can be demonstrated). Professor Bandes' argument that presenting new evidence posttrial represents a fundamental procedural due process issue is similar to my proposition that a claim of actual innocence creates its own procedural protections. In concert with the mandate for heightened reliability in capital cases, these procedural protections should ensure that no innocent individual is convicted. However, as the significant number of death row exonerations evidence, death penalty systems have failed to uphold the requisite procedural protections and heightened reliability.

432. *United States v. Quinones*, 205 F. Supp. 2d 256, 260 (S.D.N.Y. 2002).

433. In *Herrera* Chief Justice Rehnquist opined that procedural due process was the correct ground because the issue was "whether [due process] entitles petitioner to judicial review of his actual innocence claim." *Herrera v. Collins*, 506 U.S. 390, 408 n.6 (1993). It was precisely because *Herrera* had been convicted of a capital crime that the proper analysis was confined to what procedures were due. *Id.* According to the Chief Justice, the dissent erred when it applied substantive due process, because this analysis was only available if *Herrera* was innocent, which he was not. *Id.* Applying procedural due process enabled Chief Justice Rehnquist to avoid *Herrera*'s substantive claims and also created a situation where an innocent person could never come before the Court on federal habeas because he will always be presumed guilty. See Phae-

tioned trademark descriptions of substantive due process standards before concluding that executing the innocent would be constitutionally intolerable.⁴³⁴ The dissent used two of these verbal formulae to proscribe the execution of the innocent.⁴³⁵ The majority applied a history-based fundamental rights standard to establish when a criminal procedure offends due process before it analyzed Herrera's claim on procedural due process grounds.⁴³⁶ Chief Justice Rehnquist did not overtly reject Justice Harry Blackmun's substantive due process analysis. Thus, by blending the substantive due process language used by the majority and dissent, Justice O'Connor's concurrence bridges the gap between the majority and the dissent.⁴³⁷

In his *Herrera* dissent, Justice Blackmun wrote that he would have allowed a substantive due process challenge to the death penalty based on a claim of actual innocence.⁴³⁸ The dissent's application of substantive due process in *Herrera* provides insight into its role in *Quinones*. Justice Blackmun described substantive due process by turning to *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴³⁹ and specifically, its use of the Justice John Harlan's dissent in *Poe v. Ullman*.⁴⁴⁰ Quoting Justice Harlan, Justice Blackmun wrote:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is

dra Tanner, *Herrera v. Collins: Assuming the Constitution Prohibits the Execution of an Innocent Person, Is the Needle Worth the Search?*, 1994 UTAH L. REV. 1283, 1309. Since *Quinones* and *Rodriguez* still carry with them the presumption of innocence, they are not barred from using a substantive due process challenge to the FDPA. The Court's explanation why substantive due process was not available to *Herrera* justifies the application of substantive due process in *Quinones*.

434. See *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) ("Regardless of the verbal formula employed—contrary to contemporary standards of decency, shocking to the conscience, or offensive to a principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental . . .") (internal quotation marks and citations omitted).

435. *Id.* at 430 (Blackmun, J., dissenting).

436. *Id.* at 407-08. Even though any of the verbal formulae Justice O'Connor quoted can trigger substantive due process, it is significant that Justice O'Connor cited the same standard as Chief Justice Rehnquist. Both Justice O'Connor and the Chief Justice cited *Medina v. California*, 505 U.S. 437, 445-46 (1992), which quoted *Patterson v. New York*, 432 U.S. 197, 202 (1977). If the Chief Justice had reached the substantive due process issue, he would have proceeded under the same standard that he applied for the procedural due process analysis.

437. Simply put, this gap was due to the different conceptions of the core issue presented. The majority and concurring opinions saw the issue as what process was due to a legally guilty petitioner while the dissent saw the issue as whether the "Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." *Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting).

438. *Id.* at 437 (Blackmun, J., dissenting).

439. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

440. *Poe v. Ullman*, 367 U.S. 497 (1961).

not a series of isolated points It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.⁴⁴¹

Justice Blackmun did not expound in great detail on the significance of substantive due process in *Herrera*;⁴⁴² however, Justice Harlan's explanation and application of the liberty strand of the Due Process Clause is entirely relevant to the capital context, including *Quinones*.⁴⁴³

Justice Harlan clarified that the meaning of substantive due process guarantees is a "rational continuum," which signifies that the scope of substantive due process is determined according to evolving standards of fairness and ordered liberty. The parameters of this rational continuum are set forth through the "reasoned judgment"⁴⁴⁴ of a court when it adjudicates substantive due process claims. Thus, consistent with the district court's view, the precise scope of the protections of the Due Process Clause cannot be confined by specific and obdurate definitions.⁴⁴⁵

*Lawrence v. Texas*⁴⁴⁶ affirmed the flexible and broad scope of due process.⁴⁴⁷ By declaring that laws prohibiting sodomy violate a person's substantive due process rights, the *Lawrence* Court demonstrated that substantive due process is not a static concept. Relying on a line of substantive due process decisions, specifically *Casey*, the Court overturned *Bowers v. Hardwick*,⁴⁴⁸ which held that there was no fundamental right to engage in homosexual sodomy. In *Lawrence*, the Court asserted that the fundamental rights standard that it

441. *Herrera v. Collins*, 506 U.S. 390, 436 (1993) (Blackmun, J., dissenting) (quoting *Casey*, 505 U.S. at 848).

442. Justice Blackmun argued that *Herrera* could use substantive due process in just five paragraphs. After quoting Justice Harlan, Justice Blackmun discussed the "shock the conscious" standard from *Rochin v. California*, 342 U.S. 165 (1952), and then concluded that the "[e]xecution of an innocent person is the ultimate arbitrary imposition." *Herrera* at 437 (Blackmun, J., dissenting) (internal quotation marks omitted).

443. That Justice Harlan discussed the liberty strand of the due process clause does not disqualify his crucial perspective of due process from the capital context, which implicates both the life and liberty strands of the Due Process Clause. All discussion of individual liberty is moot unless the individual is alive to appreciate that liberty. Conviction and imprisonment result in a severe curtailment of liberty interests, not a complete forfeiture.

444. *Casey*, 505 U.S. at 849.

445. In *Casey*, the Court drew heavily on Justice Harlan's conception of substantive due process and specifically the principle that due process is an evolving concept. The Court quoted Justice Harlan on this point: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code." *Id.* at 849 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)) (internal quotation marks omitted).

446. 123 S. Ct. 2472 (2003).

447. *Id.*

448. 478 U.S. 186 (1986).

adopted in *Bowers* was incorrect because, in large part, it failed to appreciate that antisodomy laws severely intrude into the private relationships, homes, and lives of individuals.⁴⁴⁹ Those intrusions were only part of the general denial of autonomy that *Casey* asserted was at the heart of liberty.⁴⁵⁰ In applying substantive due process and asserting the primacy of liberty interests, specifically those emanating from privacy and autonomy, the Court rejected the history-based fundamental rights analysis from *Bowers*.⁴⁵¹ That rejection was due in large part to the fact that *Bowers*'s assertion that the proscription against homosexual sodomy had "ancient roots" was not accurate.⁴⁵² *Lawrence* thus refused to bind the parameters of substantive due process to historical grounds because: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."⁴⁵³ According to the Court, *Bowers* and its overstated reliance on historical grounds "demean[ed] the lives of homosexual persons."⁴⁵⁴

It is significant that the district court linked its understanding of due process with the standard for interpreting the Cruel and Unusual Punishment Clause.⁴⁵⁵ These two modes of interpretation overlap. Both the Eighth Amendment and the Due Process Clause have the ability to invalidate conduct and even laws when there is a direct and irreconcilable conflict with evolving standards of decency or evolving standards of fairness and ordered liberty. For example, forms of punishment, such as drawing and quartering, thumb screws, and public execution, are inconsistent with evolving standards of decency and are thus barred by the Cruel and Unusual Punishment Clause of the Eighth Amendment. Similarly, mandatory death sentences and imposition of the death penalty for rape were once acceptable but are now unconstitutional. The 113 innocent individuals who were "convicted by due process of law"⁴⁵⁶ in trials in which "the Constitution offer[ed] unparalleled protections against convicting the innocent"⁴⁵⁷ and were

449. *Lawrence*, 123 S. Ct. at 2477.

450. *Id.* at 2481-82.

451. *Id.* at 2478.

452. *Id.* at 2478-79.

453. *Id.* at 2480 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (internal quotation marks omitted)).

454. *Id.* at 2482.

455. "[I]t is settled law that the Eighth Amendment's prohibition of cruel and unusual punishment must be interpreted in light of evolving standards of decency." *United States v. Quinones*, 205 F. Supp. 2d 256, 259 (S.D.N.Y. 2002) (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)) (internal quotation marks omitted).

456. *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

457. *Id.* at 420 (O'Connor, J., concurring).

sentenced to death, spent years on death row, and even came within hours of execution, signify that the Due Process Clause must take on new meaning in capital cases. Wrongful convictions are antithetical to any formulation of due process. The due process that convicted the death row exonerees cannot be the same due process that is required for heightened reliability and fairness in capital cases. A backward-looking standard that defines fundamental rights only by what is historically acceptable does not have the capacity to incorporate the evidence of wrongful convictions, risks perpetuating manifest injustices, and freezes the meaning of due process.

b. Due Process Defined by History

Instead of interpreting the meaning of due process along a rational continuum, the Second Circuit defined due process solely by precedent and history.⁴⁵⁸ That interpretation potentially freezes the meaning of due process and frustrates its purposes. Further, the Second Circuit's argument that *Furman*, *Gregg*, and the framers accepted capital punishment in light of the realization that innocents could be executed is only possible by ignoring the significance of recent knowledge. While the Court in *Furman* and *Gregg* and the framers may have been conscious of the risk of wrongful convictions, their perspectives are not informed by the recent wave of exonerations or the revolutionary impact of DNA testing.

The Second Circuit improperly patched together the concurring opinions of Justices Marshall and Brennan when it asserted that the issue presented in *Quinones* "was squarely before the Court in *Furman*."⁴⁵⁹ In *Furman*, Justice Brennan and Justice Marshall each discussed the risk of executing innocent persons in their concurring opinions.⁴⁶⁰ Justice Brennan mentioned innocence when he discussed the ultimate severity of the death penalty and asserted that due to human fallibility, the execution of an innocent person was an inevitable event and an extreme instance of the degrading human dignity.⁴⁶¹ Justice Marshall argued that the fact that innocent people have been executed is an example of information that, if known by the public,

458. *United States v. Quinones*, 313 F.3d 49, 62-63 (2d Cir. 2002).

459. *Id.* at 65.

460. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *id.* at 364 (Marshall, J., concurring).

461. *Id.* at 290 (Brennan, J., concurring). Justice Brennan couples the execution of an innocent person with the execution of someone whose conviction was later held to be unconstitutional by a subsequent opinion. *Id.*

would lead to widespread condemnation of capital punishment.⁴⁶² Still, the *Furman* Court did not pass on the precise issue presented in *Quinones*. It is impossible that either the *Furman* or *Gregg* Courts could have been “keenly aware of the argument asserted here”⁴⁶³ because the shocking evidence of the extent of capital punishment’s fallibility was not available in 1976. Indeed, DNA testing, which was instrumental in first revealing the disturbing unreliability of capital punishment systems, was not widely available prior to 1994.⁴⁶⁴

In concluding that the district court erred by interpreting due process according to evolving standards rather than locating the asserted right in history and tradition, the Second Circuit relied on the substantive due process analysis set forth in *Washington v. Glucksberg*.⁴⁶⁵ The dominance of the history-based interpretation of due process⁴⁶⁶ stems from the Court’s deference to states’ “considered expertise in matters of criminal procedure and the criminal process.”⁴⁶⁷ Indeed,

462. *Id.* at 364 (Marshall, J., concurring). Justice Marshall also argued that knowing that the death penalty is imposed in a discriminatory manner against “identifiable classes of people” would lead to greater criticism of capital punishment. *Id.*

463. *United States v. Quinones*, 313 F.3d 49, 67 (2d Cir. 2002).

464. See Innocence Protection Act of 2001, S. 486, 107th Cong. (2001) § 101(a)(3) (“While DNA testing is increasingly commonplace in pretrial investigations today, it was not widely available in cases tried prior to 1994.”).

465. *Quinones*, 313 F.3d at 61 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). In *Glucksberg*, the Court held that a state law banning assisted suicide did not violate substantive due process. 521 U.S. at 735. The Court observed that two primary considerations inform a substantive due process analysis. First, the Court attempts to identify if the asserted right is one that is “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Id.* at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)) (internal quotation marks and citations omitted). Second, the Court requires a “careful description of the asserted fundamental liberty interest.” *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (internal quotation marks omitted). Ultimately, the Court looks to the “Nation’s history, legal traditions, and practices,” which “provide the crucial guideposts for responsible decisionmaking.” *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (internal quotation marks omitted). Even under the history-based analysis applied in *Glucksberg*, the right that the defendants claimed was imperiled—the right not to be executed when innocent—is deeply rooted in legal tradition. For an analysis and discussion of the fundamental right to life, see Daniel G. Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329 (2003).

466. In *Pacific Mutual Life Insurance Co. v. Haslip*, Justice Scalia argued for a return to the history-based approach that was first announced in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment). No other Justice joined Justice Scalia’s opinion in *Pacific Mutual*; however, the arguments he expressed structured the *Glucksberg* decision, which he authored. The relative recentness of these decisions strongly suggests that the history-based approach is not the sole, authoritative standard and is not itself deeply rooted.

467. *Herrera v. Collins*, 506 U.S. 390, 407 (quoting *Medina v. California*, 505 U.S. 437, 445-46 (1992)) (internal quotation marks omitted). Also contributing to the use of the history-based approach is the Court’s fear that the individual, subjective interpretations of individual courts

the majority of cases the Second Circuit cited in support of the history-based interpretation of due process involved disputes over state laws.⁴⁶⁸ The Court's assertion in *Patterson v. New York* that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person"⁴⁶⁹ indicates extreme deference to state criminal procedures, rather than a proclamation on the issue of innocence.⁴⁷⁰ The absence of state law and criminal procedure in *Quinones* militates against a strict application of the history-based interpretation of due process. Affirming the district court's evolving standards due process analysis would not require a wholesale abandonment of the standard *Glucksberg* articulates. Further, even proceeding under the history-based analysis "reveals that common law courts were in fact exceptionally concerned with the reliability and fairness of capital procedures, a concern that was clearly driven, as it is today, by the extremity and finality of the death sentence."⁴⁷¹

could unduly expand or contract the scope of due process protections. See *Glucksberg*, 521 U.S. at 720.

468. See *United States v. Quinones*, 313 F.3d 49, 62 (2d Cir. 2002). The Second Circuit cited the following cases, amongst others, where the Court considered the validity of state laws or criminal procedures and applied a history-based interpretation of due process: *Glucksberg*, 521 U.S. at 707 (WASH. REV. CODE § 9A.26.060(1) (1994)) ("A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide"); *Medina*, 505 U.S. at 440 (CAL. PENAL CODE ANN. § 1369(f) (West 2000)) (allocating the burden of proving incompetence to the defendant) ("[I]t shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent"); *Schad v. Arizona*, 501 U.S. 624 (1991) (recognizing that a state court was not required to give jury instructions on a lesser included offense of theft); *Patterson v. New York*, 432 U.S. 197 (1977) (considering New York's homicide statute, NEW YORK PENAL LAW § 125.25 (McKinney 1975)), and hearing a challenge to the procedures that allocated the burden of proving the mitigating circumstances of severe emotional distress to the defendant).

469. *Patterson*, 432 U.S. at 208.

470. In *Patterson*, the Court's deference to state law and criminal procedure was explicit:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 201.

471. Thurschwell, *supra* note 12, at 17. Thurschwell also notes: "Indeed, it was an accepted tenet in 17th and 18th Century England that, *in favorem vitae* ("in favor of life"), indictments, statutes, and procedural rules in capital cases had to be "construed literally and strictly." The doctrine that "death is different" has far deeper historical roots than has previously been credited." *Id.* at 17 (footnote omitted, quoting SIR MATTHEW HALE, 2 HISTORY OF THE PLEAS OF THE CROWN 35 (1763)).

History and tradition are proper guides for establishing the parameters of due process; however, ignoring current developments and recent revelations will inevitably lead to laws and principles that do not comport with contemporary standards of procedural fairness and ordered liberty. History and tradition should serve as starting points and not ending points in due process inquiries.⁴⁷² Further, the history and tradition test is highly arbitrary, particularly when the Court selects a specific period of history.⁴⁷³ To repeat Justice O'Connor's position, the verbal formulae applied are irrelevant; the execution of an innocent person, which is the defendants' central argument, is repugnant to the Constitution. The Second Circuit avoided this principle by applying the Due Process Clause in an unduly formalistic manner.⁴⁷⁴

c. Construing Due Process, Regardless of the Verbal Formula

Ultimately, neither the evolving standards nor the history-based approach represents the unequivocally authoritative standard for defining the scope of due process.⁴⁷⁵ Regardless of the verbal formula a

472. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

473. See Peter Preiser, *Rediscovering a Coherent Rationale for Substantive Due Process*, 87 MARQ. L. REV. 1, 8-18 (2003). Preiser states:

[T]hough constructed with impressive phrases, the history-and-tradition test is mere brutum fulmen. Apart from the malleability of the test itself, it is subject to three basic flaws. First there has not been a consistent rationale for identifying the period of history selected to serve as the reference point for the national tradition. Second, the Court consistently has disregarded "deeply rooted" historical traditions to justify its predilections in creating and expanding new "specially protected" liberties. Third, it has rejected claims of modern liberty interests on the basis of blindly accepted social taboos of past cultures. In other words, it turns the clock back and neglects to consider a claim "in light of its full development and its present place in American life throughout the Nation.

Id. at 10 (footnotes omitted).

474. For an argument against the "originalist" position that the Government argued and the Second Circuit adopted, see William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986). Justice Brennan argued that the theory that the death penalty is constitutional because the framers did not believe it to be cruel and unusual was "superficial." *Id.* at 324. Judge Rakoff echoed Justice Brennan's point that the text of the Fifth Amendment "merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indictment by a grand jury and, of course, due process." *Id.* The position taken by the Second Circuit resembles what Justice Brennan called "arrogance cloaked in humility." *Id.* at 325. Due to its heavy and uncritical reliance on "original intent" and precedent, the Second Circuit was able to ignore the compelling evidence of the unreliability of capital punishment systems and ultimately sidestep the defendants' arguments.

475. The Court's recent use of the history-based approach "has not halted the continuous growth in due process regulation, and has not prevented the court from imposing due process requirements invalidating practices that had been followed for many years in many states." WAYNE R. LAFAYE ET AL., 1 CRIMINAL PROCEDURE § 2.7(b) (2d ed. 2003).

court adopts, the scope of due process protections “includes a freedom from all substantial arbitrary impositions and purposeless restraints.”⁴⁷⁶ There is nothing more arbitrary than a criminal process that cannot distinguish between the innocent and the guilty. And the execution of an innocent person is the “ultimate arbitrary imposition.”⁴⁷⁷ If the requirements for heightened reliability and fairness in capital cases are to be more than mere rhetorical gestures, then the “unacceptably high rate at which innocent persons are convicted of capital crimes”⁴⁷⁸ strongly suggests that any death sentence is the “ultimate arbitrary imposition.”

The creation of a substantial risk of executing the innocent is as significant as the execution of the innocent. In the context of capital cases, the creation of a substantial risk is tantamount to the actual existence of the risk. *Gregg* observed that *Furman* “held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”⁴⁷⁹ The arbitrariness that results from death penalty systems that cannot distinguish between the guilty and the innocent is reminiscent of the pre-*Furman* landscape when there was “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”⁴⁸⁰

2. *Innocence in the Supreme Court—Understanding the Import of Herrera*

After rephrasing the defendants’ argument and misstating *Herrera*’s holding, the Second Circuit concluded that *Herrera* foreclosed the defendants’ claims. *Herrera* does not control the outcome in *Quinones* because the two cases are procedurally distinguishable. Yet *Herrera* provides guidance on the issue of innocence in capital cases. That paradoxical relationship is clear after recognizing the core holding in *Herrera*.

In *Herrera*, Chief Justice Rehnquist asserted: “[A] truly persuasive demonstration of actual innocence made after trial would render the

476. See *supra* note 441 and accompanying text.

477. *Herrera v. Collins*, 506 U.S. 390, 437 (1993) (Blackmun, J., dissenting).

478. *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002).

479. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

480. *Id.* at 188 (White, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972)) (internal quotation marks omitted). See also *Steiker & Steiker, supra* note 32, at 420 (“Today, perhaps not surprisingly, we find ourselves in a moment not dissimilar to the one that immediately preceded *Furman* and its progeny.”).

execution of a defendant unconstitutional.”⁴⁸¹ Justice White concurred with the principle that executing an innocent person is unconstitutional.⁴⁸² Justice O’Connor, joined by Justice Anthony M. Kennedy, emphasized that “the execution of a legally and factually innocent person would be a constitutionally intolerable event.”⁴⁸³ Justice O’Connor’s concurrence explicitly stated that the Court did not hold that the execution of an actually innocent person did not offend the Constitution.⁴⁸⁴ Taken together, the Chief Justice’s assertion and the concurring opinions convey that executing an innocent person is unconstitutional. The overwhelming concurrence on this point suggests that it was not made for the Court’s own analysis, as the Second Circuit posited when it ignored the concurring opinions.⁴⁸⁵ Without the assertion that there can be a showing of actual innocence, albeit a very strong showing, that would render an execution unconstitutional, it is less likely that the two crucial votes of Justices O’Connor and Kennedy would have sided with the majority. *Herrera* assumes the right not to be executed when innocent because the Court was not presented with a bona fide claim of actual innocence in a capital case.⁴⁸⁶ That the Court assumed that executing the innocent is unconstitutional strengthens rather than weakens the claim because the Court essentially protected a right that was not in fact before it.

The second crucial aspect of *Herrera* is that to warrant habeas relief, the petitioner must make a “truly persuasive” showing of actual innocence.⁴⁸⁷ Thus, it is unconstitutional to execute the actually innocent, but to obtain habeas relief a petitioner must meet an “extraordinarily

481. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Any doubts that this is the core holding of *Herrera* are answered by subsequent courts that cite this portion of Justice Rehnquist’s opinion as the holding. See, e.g., *Schlup v. Delo*, 513 U.S. 298, 314 n.28 (1995).

482. *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment).

483. *Id.* at 419 (O’Connor, J., concurring). Only Justices Scalia and Thomas, who concurred, did not explicitly assert that the execution of an innocent person was unconstitutional. Justice Scalia wrote that newly discovered evidence relevant to guilt or innocence did not provide grounds for federal habeas corpus relief. *Id.* at 428-29 (Scalia, J., concurring). One author concluded that Justices Scalia and Thomas “clearly believe that the Constitution provides no protection whatsoever to a condemned innocent person for whom the justice system has failed—even when the result is the taking of an innocent life.” Kathleen Cava Boyd, *The Paradox of Actual Innocence in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. REV. 479, 494 (1994).

484. *Herrera*, 506 U.S. at 427 (O’Connor, J., concurring).

485. *United States v. Quinones*, 313 F.3d 49, 68-69 (2d Cir. 2002).

486. See *infra* note 588.

487. *Herrera*, 506 U.S. at 517. It is significant that the Court has never explicitly defined what the “truly persuasive” standard actually means. The Court has not provided specific criteria for what a petitioner must show to pass the threshold set in *Herrera*. Leonel Herrera failed to make this threshold showing; however, Lloyd Schlup did make a showing of actual innocence that was of a sufficient degree to serve as a gateway for distinct constitutional claims. See *Schlup v. Delo*, 513 U.S. 298, 315-17 (1995).

high" threshold.⁴⁸⁸ In the Court's eyes, Leonel Herrera fell well short of this high bar.⁴⁸⁹ In light of the Court's position that executing the innocent is unconstitutional, it is improper to overemphasize this second aspect of the holding. Herrera's inability to make a truly persuasive showing of actual innocence, which barred habeas relief, has no affect on the proscription against executing the innocent.

Herrera also explicitly stated that, by itself, "actual innocence is not itself a constitutional claim."⁴⁹⁰ The Second Circuit concluded that this language clearly foreclosed the defendants' claim.⁴⁹¹ But taken in context, it is clear that the Supreme Court ostensibly diminished the value of actual innocence only because the claim was brought in a successor petition for a writ of habeas corpus.⁴⁹² Limits on habeas relief in light of finality and federalism dominate *Herrera*.⁴⁹³ Chief Justice Rehnquist wrote: "But this body of our habeas jurisprudence makes clear that a claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."⁴⁹⁴ The Second Circuit cited this language, including "our habeas jurisprudence,"⁴⁹⁵ yet it failed to address the glaring procedural differences between *Herrera* and *Quinones*.⁴⁹⁶ *Quinones* does

488. *Herrera*, 506 U.S. at 417.

489. See *id.* at 417-19 (Petitioner's "showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist."); *id.* at 421-25 ("Nonetheless, the proper disposition of this case is neither difficult nor troubling. No matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief.") (O'Connor, J., concurring). See also *id.* at 421 (O'Connor, J., concurring); *id.* at 424 ("The conclusion seems inescapable: Petitioner is guilty. The dissent does not contend otherwise.") (O'Connor, J., concurring). See also Bandes, *supra* note 430 at 505 n.20 (discussing how Herrera's claim was "extremely weak").

490. *Herrera*, 506 U.S. at 404.

491. *Quinones*, 313 F.3d at 68.

492. One commentator has phrased the issue presented in *Herrera* in terms that clearly convey that the case was controlled by habeas jurisprudence: "[T]he Court was asked to decide, for the first time, whether a death-row inmate's claim of actual innocence, not linked to any particular procedural errors that might have occurred during the inmate's state trial or appellate litigation, may serve as the basis for a grant of federal habeas corpus relief." Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817 (1993). See also Boyd, *supra* note 483, at 488 (noting that the "principal issue in *Herrera* was whether Leonel Herrera's claim of actual innocence, based on newly discovered evidence, constituted grounds for federal habeas relief").

493. See *Herrera*, 506 U.S. at 400-401.

494. *Id.* at 404.

495. *Quinones*, 313 F.3d at 67.

496. *Id.* at 68. The Court of Appeals neglected to discuss the crucial procedural differences between *Herrera* and *Quinones*, which is emblematic of its imposition of a process-oriented solution when the issue was substantive. See Hoffman, *supra* note 492, at 825 (discussing the difficulties of a process-oriented solution to substantive problems). The two problems Professor Hoffman identifies are: procedural law can be expanded beyond its limits in an endeavor to

not fold into the complicated “body of our habeas jurisprudence” because *Quinones* was decided on a pretrial motion. Motivated by the desire to shelter federal courts⁴⁹⁷ from a deluge of “frivolous claims of actual innocence,”⁴⁹⁸ the Court limited the role of a stand-alone claim of actual innocence to that of a gateway for other procedurally defaulted constitutional claims to pass through in order to be heard on their merits. Unlike Leonel Herrera, the defendants in *Quinones* appeared before the court with their presumption of innocence intact.⁴⁹⁹

Further, *Herrera* does not control the issue presented in *Quinones* because the majority failed to reach the issue of actual innocence on substantive due process grounds;⁵⁰⁰ substantive due process was crucial in informing the decision in *Quinones*. Even though the core holding of *Herrera* is deeply invested in actual innocence, the disposition of the case was dictated by the prevailing concerns of habeas jurisprudence.⁵⁰¹ As Chief Justice Rehnquist asserted: “The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his ‘actual innocence’ claim.”⁵⁰² The latter concern is not an issue in *Quinones*; it is the former issue—whether the government can execute the innocent—that is central. *Herrera* supplies the answer to

achieve perfect results and procedural law can become unduly complex and over regulate substantive law it is intended to facilitate. *Id.*

497. “Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.” *Herrera*, 506 U.S. at 401.

498. *Id.* at 426 (O’Connor, J., concurring).

499. As Justice Rehnquist described, *Herrera* “[did] not come before the Court as one who is innocent, but, on the contrary, as one who has been convicted by due process of law of two brutal murders.” *Herrera*, 506 U.S. at 399-400. See *United States v. Sampson*, 275 F. Supp. 2d 49, 75-76 (D. Mass. 2003) (noting that *Herrera* does not foreclose a defendant’s challenge to the FDPA because the defendant had not been convicted).

500. See *Herrera*, 506 U.S. at 407 n.6. “The issue is properly analyzed only in terms of procedural due process.” *Id.*

501. Failure to recognize this crucial distinction contributes to an improper view of *Herrera* and issues of innocence in capital cases. For example, in *United States v. Church*, 217 F. Supp. 2d 700 (W.D. Va. 2002), the defendant, in a pretrial motion, urged the district court to adopt the Judge Rakoff’s analysis. The district court refused to do so and observed that “[t]he Supreme Court’s decision in *Herrera* thus forecloses the argument that the inherent fallibility of the criminal justice system supports a due process attack on the death penalty.” *Id.* at 702. The district court neglected to consider the overriding habeas corpus concerns in *Herrera*, which were entirely absent from the case before it. *Id.* at 700-02.

502. *Herrera*, 506 U.S. at 407 n.6. See also *id.* at 420 (O’Connor, J., concurring) Justice O’Connor stated:

The issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial.

Id.

this question: "the execution of a legally and factually innocent person would be a constitutionally intolerable event."⁵⁰³ That it would be constitutionally intolerable to execute an innocent person provides the starting point rather than the conclusion for *Quinones*. However, *Herrera* is still central to the outcome in *Quinones*.

The Second Circuit concluded that *Herrera* established that there is no fundamental right to a continued opportunity to prove one's innocence, which foreclosed the defendants' argument.⁵⁰⁴ That conclusion misrepresents both *Herrera* and the defendants' argument. The Second Circuit improperly severed the factual basis of the defendants' argument. That factual basis recognizes that capital punishment systems create a significant risk of wrongful convictions and executions.⁵⁰⁵ The conclusion that the FDPA is unconstitutional because execution prevents innocent individuals from proving their innocence is inextricably intertwined with the recognition of an "unacceptably high rate at which innocent persons are convicted of capital crimes."⁵⁰⁶ Neglecting to consider that factual predicate enabled the Second Circuit to argue that *Herrera* controlled.

Illustrative of the Second Circuit's muddling of *Herrera*'s proclamations on the "fundamental right" at issue in *Quinones* is its assertion that "[t]he [*Herrera*] Court then declined to hold that 'execution of a person who is innocent of the crime for which he was convicted' amounts to an independent violation of either the Eighth Amendment or the Due Process Clause."⁵⁰⁷ The full text from which the Second Circuit quoted demonstrates that procedural concerns significantly impacted the Court's holding:

But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of [ten] years.⁵⁰⁸

Concerns for finality in judgments and deference to state court criminal procedures compelled the *Herrera* decision, not constitutional concerns for a fundamental right not to be executed when innocent.

503. *Id.* at 419 (O'Connor, J., concurring).

504. *Quinones*, 313 F.3d at 67-68.

505. *See Quinones*, 205 F. Supp. 2d at 268.

506. *Id.*

507. *Quinones*, 313 F.3d at 67 (quoting *Herrera*, 506 U.S. at 398).

508. *Herrera*, 506 U.S. at 398.

The Second Circuit also misstated the district court's identification of the liberty interests at stake. Failing to accurately cite the district court opinion facilitated the Second Circuit's imposition of *Herrera*. The Second Circuit asserted that "the District Court erred in recognizing a "[fundamental] right of an innocent person not to be deprived, by execution, of the opportunity to demonstrate his [or her] innocence."⁵⁰⁹ In the place of "fundamental," which the Second Circuit imposed, the district court wrote, "[i]f protection of innocent people from state-sponsored execution is a protected liberty, and if such protected liberty includes" ⁵¹⁰ The excised material was in response to the Government's argument that Congress performed a "death calculus" and assumed the risk of executing innocents when it enacted the FDPA.⁵¹¹ Replacing the material with "fundamental" is misleading because the full text shows that the opportunity to demonstrate one's innocence flows directly from the protected liberty interest of not being executed when one is innocent. The fundamental right is the protected liberty interest of not being executed when innocent. The right to prove one's innocence flows from this protected interest. The Second Circuit improperly identified the right to prove one's innocence as the fundamental right at issue here. In so doing, the Second Circuit phrased the issue in *Quinones* in terms of the rights that are extended to convicted persons and the opposing interests of finality and federalism. By improperly framing the issue presented, the Second Circuit effectively allowed inapposite principles of habeas jurisprudence to trump the right not to be executed when innocent. The Second Circuit thus evaded the core of the district court's opinions.⁵¹² In response to the district court's argument, the Second Circuit transformed *Herrera* into an impervious blockade.

Contrary to the Second Circuit's conclusion, affirming the district court would not require overruling *Herrera*. Overruling *Herrera*

509. *Quinones*, 313 F.3d at 69 (quoting *Quinones*, 205 F. Supp. 2d at 261) (substitution in original).

510. *United States v. Quinones*, 205 F. Supp. 2d 256, 261 (S.D.N.Y. 2002).

511. *See id.* at 261.

512. The Second Circuit's conclusion also shows that it failed to appreciate the significance of the evidence presented before it. In writing that it would not overrule *Herrera* "based solely on a statistical or theoretical possibility that a defendant might be innocent," the court appears to reference Liebman's *A Broken System* studies. *Quinones*, 313 F.3d at 63. *A Broken System I* and *II* played a minor role in the district court's opinions. In *Quinones II* the district court used Liebman's studies only to defend them from the government's "ad hominem" attacks. *Quinones*, 205 F. Supp. 2d at 268. Consistent with the Second Circuit's failure to address the factual basis of the district court's opinion, it improperly discounted the significance of Liebman's studies, corroborating state and federal studies, and the living examples of capital punishment's failures, who represent more than a "theoretical possibility" of failure.

would require confronting the Court's position on the habeas issues presented in *Herrera*. These issues were not implicated in the district court's opinion. Of the three bedrock principles of the Court's habeas jurisprudence, "finality, federalism, and fairness,"⁵¹³ only fairness is directly at issue in *Quinones*. Thus, *Quinones* emphasizes the individual interests at stake rather than the systemic interests that dominated *Herrera*. Finality and federalism only came into play after the Second Circuit improperly phrased the district court's opinion and the defendants' arguments. Further, *Quinones* is consistent with *Herrera's* position that executing the innocent is unconstitutional, a position that the Second Circuit goes to great lengths to discount.

3. *Challenging the FDPA Without Using the Eighth Amendment*

The district court decided *Quinones* on due process rather than on Eighth Amendment grounds, even though the defendants presented Eighth Amendment claims.⁵¹⁴ A brief analysis of the Supreme Court's attitude toward the Cruel and Unusual Punishment Clause in capital cases reveals that there may be substantial advantages in electing to use the Due Process Clause. These advantages arise from the Court's narrowing of the Cruel and Unusual Punishment Clause. Ultimately, the district court's application of the Due Process Clause demonstrates that it is a potentially viable alternative to the Eighth Amendment in challenges to death penalty systems.

In *Gregg*, the Court announced the analysis for determining if a criminal punishment is excessive and is thus not in accord with the "dignity of man": "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."⁵¹⁵ "Excessiveness" must be defined according to "the evolving standards of decency that mark the progress of a maturing society."⁵¹⁶ To determine these contemporary values, the Court looks "to objective indicia that reflect the public attitude toward a given sanction" and not to its own subjective judgment.⁵¹⁷ The best indication of the public's attitude toward a specific criminal punishment is through state legisla-

513. *Withrow v. Williams*, 507 U.S. 680, 697 (1993) (O'Connor, J., concurring in part and dissenting in part).

514. *See United States v. Quinones*, 196 F. Supp. 2d 416, 419 n.7 (S.D.N.Y. 2002).

515. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Court rephrased this analysis when it stated that legislation has a presumption of validity. A punishment is valid under the Eighth Amendment unless it is "cruelly inhumane or disproportionate to the crime involved." *Id.* at 175.

516. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

517. *Gregg*, 428 U.S. at 173.

tures.⁵¹⁸ The other primary indication of contemporary values is the jury.⁵¹⁹ A punishment is cruelly inhumane and excessive if it does not "comport[] with the basic concept of human dignity."⁵²⁰ A punishment that has no purpose other than to inflict pain and suffering is not in accord with human dignity. The Court determined that the penological justifications of retribution⁵²¹ and deterrence⁵²² are acceptable purposes for capital punishment.

In *Coker v. Georgia*, the Court reaffirmed the analysis set forth in *Gregg*: "Under *Gregg*, a punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."⁵²³ The Court analyzed state legislation⁵²⁴ and the sentencing decisions of juries,⁵²⁵ which both showed that imposing the death sentence for rape did not comport with evolving standards of decency. However, the Court emphasized that the analysis did not end with the attitudes of legislatures and juries. The Court stated that its "own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."⁵²⁶ The Court used its "own judgment" in an extensive analysis and determined that the death penalty was disproportionate to the crime of rape.⁵²⁷

In *Enmund v. Florida*,⁵²⁸ the Court held that it was unconstitutional to impose the death penalty when the defendant did not kill or intend to kill.⁵²⁹ The Court examined state legislatures,⁵³⁰ sentencing habits

518. *Id.* at 179-81.

519. *Id.* at 181-82.

520. *Id.* at 182.

521. "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184.

522. The Court acknowledged that the deterrent effect of capital punishment was inconclusive and is absent from murders committed in the heat of passion; however, it concluded that "for many [other murders] the death penalty undoubtedly is a significant deterrent." *Id.* at 185-86.

523. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

524. *Id.* at 594-96.

525. *Id.* at 596-98.

526. *Id.* at 597. Justice Powell separately concurred with this assertion: "objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment . . . must be decided on the basis of our own judgment in light of the precedents of this Court." *Id.* at 603-04 n.2 (Powell, J., concurring in the judgment in part and dissenting in part).

527. *Id.* at 597.

528. *Enmund v. Florida*, 458 U.S. 782 (1982).

529. *Id.* at 801.

of juries,⁵³¹ and the penological interests of retribution and deterrence.⁵³² This latter analysis followed and folded into the Court's application of the proportionality test. The Court affirmed *Coker's* assertion that it had a role in determining whether the death penalty was grossly disproportionate to the crime: "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund."⁵³³ *Thompson v. Oklahoma*⁵³⁴ cited this crucial language when it emphasized that the judge played a fundamental role in determining when the death penalty was appropriate.⁵³⁵

The role of the judge in the proportionality analysis came under heavy fire in *Stanford v. Kentucky*.⁵³⁶ In *Stanford*, Justice Scalia argued that the essential factors in determining contemporary attitudes toward a punishment are "statutes passed by society's elected representatives."⁵³⁷ For the majority, state legislation was the most reliable indication of whether a punishment is cruelly inhumane. Justice Scalia only briefly addressed the sentencing habits of juries.⁵³⁸ He also discounted the value of socioscientific evidence that suggested that imposing the death penalty on individuals under eighteen years old has limited effects on the penological interests of deterrence and retribution.⁵³⁹ In doing so, Justice Scalia "emphatically reject[ed]" the contention that judges can use their "own informed judgment[s]" to interpret evidence.⁵⁴⁰ The plurality expressed its distaste for the "so-

530. *Id.* at 789-93.

531. *Id.* at 794-96.

532. *Id.* at 789-801.

533. *Id.* at 797.

534. The Court also reiterated that it must look to legislatures and juries to determine contemporary standards for Eighth Amendment purposes. *Thompson v. Oklahoma*, 487 U.S. 815, 823-33 (1988).

535. *Id.* at 833. See also *id.* at 823 n.8, in which the Court cited *Coker* to support this proposition.

536. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the capital punishment for individuals who were sixteen and seventeen at the time the capital offense was committed is not unconstitutional).

537. *Id.* at 370. Justice Scalia first annunciated a narrower Eighth Amendment test in his *Thompson* dissent, which was joined by Chief Justice Rehnquist and Justice White. There, Justice Scalia argued that the meaning of cruel and unusual must be determined by "our national society" and not by "perceptions of decency" held "by a majority of the small and unrepresentative segment of our society that sits on this Court." *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

538. *Stanford*, 492 U.S. at 373-74.

539. *Id.* at 378.

540. *Id.*

called 'proportionality' analysis"⁵⁴¹ used in *Coker*, *Enmund*, and *Thompson*:

To say, as the dissent says, that it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty, and to mean that as the dissent means it, *i.e.*, that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and measurably contributory to acceptable goals of punishment—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.⁵⁴²

Under this analysis, a judge should never use his or her "own judgment"⁵⁴³ to determine whether the death penalty is appropriate for a

541. *Id.* at 379.

542. *Id.* (internal quotation marks and citations omitted).

543. The reference to "philosopher kings" is telling. It is plainly meant to evoke the "Platonic Guardian." See generally Matthew E. Albers, Note, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467, 495-97 (1999). Members of the Court have elicited the specter of the Platonic Guardian when urging for judicial restraint in matters. See, e.g., *Holder v. Hall*, 512 U.S. 874, 913 (1994) (Thomas, J., concurring) ("We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America."); *Texas v. Johnson*, 491 U.S. 397 at 435 (1989) (Rehnquist, C.J., dissenting) ("The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government."); *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) ("However, the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"); *Powell v. Texas*, 392 U.S. 514, 547 (1968) (Black, J., concurring):

This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness.

Id. *Griswold v. Connecticut* was the first case to make use of the "Platonic Guardians" reference. 381 U.S. 479 (1965). Arguing that the concurring opinion's due process analysis unduly invited the use of personal preferences in decision making, Justice Black quoted Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *Id.* at 526-27 (Black, J., dissenting) (quoting LEARNED HAND, *THE BILL OF RIGHTS* 70 (1958)). That the reference to "Platonic Guardians" in *Griswold* was in part an attack on the use of substantive due process does not diminish the contention that the substantive due process argument in *Quinones* presents an alternative to the Eighth Amendment. There is no doubt that the mere invocation of substantive due process would encounter as much, if not more, resistance than the Eighth Amendment proportionality test. The point of this argument is not that all the members of the Court would accept a substantive due process challenge to the death penalty. Rather, certain members of the Court have a confined view of the Eighth Amendment and have taken and will continue to take opportunities to narrow the test further until what is cruelly inhumane becomes nothing more than a survey of state legislatures and brief mention of jury sentencing habits. In light of this trend, a substantive due process analysis will enable judges to use their "own judgment[s]" and

particular offender, class of offenders, or crime. That argument folds the two-step analysis announced in *Gregg* into a one-step survey of state legislation.⁵⁴⁴ The two-step analysis survived *Stanford* because Justice O'Connor did not join the plurality's view that judges have no role in conducting a proportionality analysis.⁵⁴⁵ Even though *Stanford*'s perspective of the Eighth Amendment analysis is not controlling, the members of the Court who espoused it have supported it with increased fervor. Exemplifying this position is the dissent in *Atkins*.

In *Atkins*, Justice Stevens applied *Gregg*'s two-part Eighth Amendment analysis and held that executing the mentally retarded violated the Cruel and Unusual Punishment Clause.⁵⁴⁶ Justice Stevens surveyed state and federal legislation⁵⁴⁷ and concluded that there was a national consensus against executing the mentally retarded.⁵⁴⁸ Drawing on *Coker* and *Enmund*, Justice Stevens stressed that the Eighth Amendment analysis involved objective evidence as well as his "own judgment,"⁵⁴⁹ which he used to conduct an "independent evaluation"⁵⁵⁰ and to determine if there was any reason to disagree with legislation that made the mentally retarded ineligible for the death penalty. Through its independent evaluation, the Court concluded that executing the mentally retarded did not serve the penological interests of deterrence and retribution.⁵⁵¹ The majority's independent investigation inflamed the dissenters, who argued that a narrow Eighth Amendment analysis was the appropriate standard.

Chief Justice Rehnquist emphasized that the meaning of the Eighth Amendment must be determined solely by an analysis of legislative action and sentencing jury determinations.⁵⁵² He also labeled the ma-

to apply scientific evidence, which to certain members of the Court is an anathema that has no place in an Eighth Amendment analysis.

544. One student writer has described the Eighth Amendment analysis employed in *Stanford* as a "crude poll" in which the Court makes the Eighth Amendment a slave to majority whims concerning the severity and necessity of punishment. Albers, *supra* note 543, at 468-69. Albers argued that narrowing the Eighth Amendment analysis in *Stanford* amounted to "an unconstitutional delegation of the Court's authority to decide constitutional issues" where the Court abdicated its role by showing too much deference to state legislatures. *Id.* at 468.

545. *Stanford*, 492 U.S. at 382-83 (O'Connor, J., concurring in part and concurring in the judgment).

546. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

547. *Id.* at 313-17. The majority did not examine the sentencing habits of juries. *See id.* at 324-25 (Rehnquist, C.J., dissenting).

548. *Id.* at 315.

549. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (internal quotation marks omitted).

550. *Id.*

551. *Atkins*, 536 U.S. at 317-19.

552. *Id.* at 321 (Rehnquist, C.J., dissenting).

jority opinion “a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”⁵⁵³ The Chief Justice argued that the independent evaluation enabled the majority to use irrelevant information in determining a consensus—opinion polls, international opinion, and the views of professional and religious organizations had no bearing on the Eighth Amendment.

Justice Scalia was more vocal than the Chief Justice in excoriating the majority for its analysis and declaring its holding to be nothing more than the product of its “personal views.”⁵⁵⁴ Justice Scalia echoed the Chief Justice’s position that the Eighth Amendment analysis is a narrow test that is limited to “objective indicia, the most important of which is legislation enacted by the country’s legislatures.”⁵⁵⁵ For Justice Scalia, the use of opinion polls and views from the “world community” epitomized the majority’s failure to adhere to the narrow Eighth Amendment analysis that he argued for in *Stanford*.⁵⁵⁶ For the dissenters, the majority’s expansion of what should be a limited Eighth Amendment analysis was an arrogant “pretension to a power”⁵⁵⁷ fit for philosopher kings.

The strong dissents in *Atkins* evidence a consistent endeavor to limit Eighth Amendment analysis. This limited analysis closes the door on compelling scientific evidence that legislatures have not had time to consider, much less act upon. With the death penalty, any lapse in time before a vast majority of legislatures can enact laws may result in the executions of individuals who do not deserve to die. The district court’s due process analysis enables courts to avoid the restrictions and potential consequences of a narrow Eighth Amendment analysis.

In *Quinones*, evolving standards of fairness and ordered liberty expand rather than narrow objective factors that determine the scope of the due process rights of capital defendants. Because “fairness” and “ordered liberty” are not bound to majoritarian social standards under the due process analysis, judges may contemplate injustices and due process deprivations that have not developed into political is-

553. *Id.*

554. *Id.* at 338 (Scalia, J., dissenting).

555. *Id.* at 340 (Scalia, J., dissenting) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989)) (internal quotation marks omitted).

556. Justice Scalia did not hide his disapproval of using public opinion polls, views of professional and religious organizations, and international opinion. He awarded that evidence the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’” *Atkins*, U.S. 304, 347 (Scalia, J., dissenting).

557. *Id.* at 348 (Scalia, J., dissenting).

sues.⁵⁵⁸ Substantive due process addresses accuracy in the judicial system and safeguards against legislative and executive conduct that violates recognized individual interests. The Eighth Amendment, which is confined to what legislatures deem to be acceptable standards, may be formulated to sanction inaccurate procedures, which is in direct contradiction to the core concerns of *Furman* and *Gregg*.⁵⁵⁹ The increased scope of evidence available in the due process analysis is particularly relevant because the decisionmaker has the power to apply this information to define the scope of due process protections.

If the defendants in *Quinones* had brought their claim solely on Eighth Amendment grounds, the significant evidence that death penalty systems cannot distinguish between the innocent and the guilty would have no weight. Professor Liebman's studies are irrelevant in an Eighth Amendment analysis. Similarly, calls for state-funded studies and even moratoriums, which unequivocally express deep concern about the reliability of capital punishment systems, have no weight in an Eighth Amendment analysis.

Most importantly, the undisputed fact that over one hundred individuals have been exonerated from death rows across the nation would be irrelevant. By using the Due Process Clause, the district court gave constitutional value and weight to these individual tragedies.⁵⁶⁰ These individual tragedies cannot be ignored or subsumed into a categorical analysis. They represent more than "statistical or theoretical"⁵⁶¹ possibilities that capital punishment is deeply flawed.

558. See Bird, *supra* note 465, at 1340 ("Majority rule, it would seem, is entitled to little deference when fundamental rights are at stake.").

559. *Furman* invalidated capital punishment statutes because their procedures did not ensure against arbitrary results. *Furman v. Georgia*, 408 U.S. 238 (1972). *Gregg* upheld capital punishment statutes because their procedures were tailored so as to diminish the possibility of arbitrary results. See *Gregg v. Georgia* 428 U.S. 153, 206 (1976) ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.").

560. A link between due process and preventing wrongful executions is suggested in the American Bar Association's call for a national moratorium. The ABA called for a moratorium until states implement procedures "intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed." A.B.A., Report with Recommendations No. 107 (1997), available at <http://www.abanet.org/irr/rec107.html> (last visited Jan. 18, 2004).

561. *United States v. Quinones*, 313 F.3d at 69. A blatant diminution of the implications of the death row exonerations is evident in *United States v. Denis*, 246 F. Supp. 2d 1250 (S.D. Fla. 2002). In *Denis*, the defendant argued that the FDPA was unconstitutional based on Judge Rakoff's findings. *Id.* at 1252. The district court turned aside these arguments. *Id.* at 1253. It concluded that it was unnecessary to reach "the issue of whether the likelihood of executing an innocent person automatically denies due process" because "the use of statistics that apply to state death penalty cases cannot support a conclusion of that possibility in federal cases." *Id.*

Complete deference to legislatures fails to give adequate weight to these individuals.⁵⁶² Further, a due process analysis provides judges with flexibility to act within the bounds of ordered liberty and procedural fairness.⁵⁶³

The overlap between the Due Process Clause and Eighth Amendment does not end with the similar form of the evolving standards tests. Life is a fundamental right. Substantive due process serves as a safeguard against any arbitrary and unfair deprivations of this right. In this sense, substantive due process addresses the core purpose of the Eighth Amendment. As Justice Marshall acknowledged in *Furman*:

The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it. Thus stated, the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State.⁵⁶⁴

Here, Justice Marshall contended that substantive due process and the Cruel and Unusual Punishment Clause are similar because they each protect concerns that the state must have a certain level of interest in

The district court was skeptical of statistics, claiming, "they can be easily manipulated," without any further elaboration. *Id.* The district court concluded that the death row exonerations and findings of fallibility amounted to "anecdotal information reported in the media" and "statistics or anecdotes on state convictions" that were improper bases for any legal decision and were "of no significance" to a federal case. *Id.* The district court's ultimate failure to appreciate the significance of the tragedies that each death row exoneration represents and its exuberant faith in the federal courts epitomizes avoidance of the glaring problems wrongful convictions present.

562. Excessive deference to state legislatures is not responsive to individual rights and inherently favors upholding death sentences and death penalty statutes. See Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996). Raeker-Jordan notes that using jury sentencing behavior to determine evolving standards of decency creates "predetermined" results because "juries will have imposed death more often because of the effects of the procedural rules" and thus, "the 'objective index' of societal standards of decency will show a favoring of death sentences." *Id.* at 457-58. Raeker-Jordan also argued that the Court's "selective evaluation of legislative enactments" results in a "death-inclined" standard. *Id.* at 458. Raeker-Jordan called for "additional tests [to] ensure the continuing vitality of the Eighth Amendment and maintain its function as a bulwark against the vengeful and otherwise unrestrained impulses of the majority." *Id.* at 556.

563. In *Furman*, Justice Marshall observed that constant deference to legislatures comes at a cost: "[T]he point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution." *Furman v. Georgia*, 408 U.S. 238, 359 (1972) (Marshall, J., concurring).

564. *Id.* at 359-60 n.141 (Marshall, J., concurring) (citations omitted).

before it can regulate those concerns.⁵⁶⁵ For substantive due process, the state's interest must be compelling because the individual concern, life, is a fundamental right. Thus, by deciding *Quinones* on substantive due process grounds, the district court addressed the purposes of the Cruel and Unusual Punishment Clause. The district court also incorporated essential evidence that would have been precluded under an Eighth Amendment analysis.

*United States v. Sampson*⁵⁶⁶ illustrates the limits of the Eighth Amendment evolving standards analysis in the context of the FDPA. In *Sampson*, the defendant based one of his challenges to the FDPA on *Quinones* and argued that the FDPA is unconstitutional because "it will inevitably result in the execution of innocent individuals."⁵⁶⁷ The defendant raised that claim on substantive due process and Eighth Amendment grounds. The court recognized that substantive due process and the Eighth Amendment overlap,⁵⁶⁸ but only addressed the defendant's Eighth Amendment claims.⁵⁶⁹ The court's discussion of the risks of executing the innocent closely mirrors the analysis in *Quinones*, especially with respect to the dramatic impact of DNA evidence.⁵⁷⁰ After considering the high risk of error and coordinate risk of executing the innocent, the court even concluded that "the FDPA . . . will inevitably result in the execution of innocent people."⁵⁷¹ Then the court turned to the Eighth Amendment and observed that "evolving standards of decency must be ascertained from objective factors to the maximum possible extent."⁵⁷² Using the broader analysis from *Atkins*, the court noted: international opinion

565. The Second Circuit cited this passage in support of its proposition that substantive due process extends no protections beyond the scope of the Eighth Amendment. *Quinones*, 313 F.3d at 70 n.18. The Second Circuit reasoned that because *Gregg* established that the death penalty is not per se unconstitutional, a claim based on substantive due process could not invalidate capital punishment per se. *Id.* The language the Court cited does not support the contention that the scope of the Eighth Amendment demarcates the ultimate scope of substantive due process protections. However, the language does support the applicability of substantive due process in capital cases. Justice Marshall's observation merely establishes that the government must have a compelling interest to take a life because the right to life is fundamental. Further, the district court never declared that the FDPA was per se unconstitutional, which the court of appeals persistently claimed it did. *Id.* at 69-70.

566. 275 F. Supp. 2d 49, 62 (D. Mass. 2003).

567. *Id.* at 62.

568. *Id.* at 63 ("[T]he Supreme court essentially treats the Eighth Amendment and substantive due process standards as interchangeable.").

569. *Id.* at 63-64.

570. *Id.* at 76-78.

571. *Id.* at 81.

572. *Id.* at 83 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)) (internal quotation marks omitted).

was strongly opposed to the death penalty;⁵⁷³ public opinion polls;⁵⁷⁴ jury decisions showing almost a unanimous rejection of the death penalty;⁵⁷⁵ and even the moratoriums in Illinois and Maryland.⁵⁷⁶ But then the court turned to state legislatures and, based on the fact that thirty-eight states use the death penalty, it concluded: "The objective evidence is not now sufficient to demonstrate that contemporary standards of decency have generated a national consensus that the death penalty constitutes cruel and unusual punishment because of the risk of executing the innocent."⁵⁷⁷ Thus, the district court cannot translate its recognition that execution of the innocent is inevitable under the FDPA into a cognizable Eighth Amendment claim because a majority of state legislatures have not abolished their death penalties. Using substantive due process, Judge Rakoff used the inevitable execution of innocents as a constitutional claim without the strictures the Eighth Amendment analysis imposes.

In *Graham v. Connor*⁵⁷⁸ the Court warned against adopting substantive due process analyses when another constitutional provision "provides an explicit textual source of constitutional protection" against a specific government behavior.⁵⁷⁹ However, the Eighth Amendment, as *Sampson* illustrates, fails to address the issue of wrongful convictions and executions. Substantive due process does not share the Eighth Amendment's disconnect with those issues. Thus, *Graham* does not conclusively require the Eighth Amendment to control every capital case. The numerous capital cases decided on due process, rather than on Eighth Amendment grounds, further support that assertion.⁵⁸⁰

Quinones was not the product of wanton judicial activism; it was a "reasoned judgment," based on incontrovertible and shocking evidence that a system wrought with infirm procedures fails to provide

573. *Sampson*, 275 F. Supp. 2d at 83.

574. *Id.* at 84.

575. *Id.* at 84-85.

576. *Id.* at 85.

577. *Id.* at 86.

578. 490 U.S. 386 (1989).

579. *Id.* at 395.

580. See *supra* notes 385-421 and accompanying text. *Graham* also specifies that the Eighth Amendment is the primary source of protection in cases where the punishment is challenged as excessive and unjustified, not substantive due process, which offers protections that are "at best redundant of that provided by the Eighth Amendment." *Graham*, 490 U.S. at 395 n.10. *Graham* is thus distinguishable on two grounds. First, *Quinones* involves a pretrial motion, not a postconviction appeal. Second, due to the different "evolving standards" analyses, the scopes of the Eighth Amendment and substantive due process are distinct. For additional arguments distinguishing *Graham* from the capital punishment context, see Bird, *supra* note 465, at 1376-81.

the innocent individuals it convicts with sufficient opportunities to prove their innocence. The district court properly applied the Due Process Clause as a check on executive and legislative authority.⁵⁸¹ In doing so, the district court emphasized the individual interests at stake, which is entirely consistent with the origins of the Due Process Clause.⁵⁸² The Second Circuit applied the improper analysis, ignored crucial evidence, and misstated the defendants' arguments and the lower court's opinions so that it could fall back on precedent that was not informed of the extent of capital punishment's fallibility. Declaring the FDPA unconstitutional was the appropriate response to the evidence presented and the necessary step to ensure "freedom from all substantial arbitrary impositions."⁵⁸³

C. Fell

Fell acknowledged *Quinones*,⁵⁸⁴ but unlike *Quinones*, it concentrated on a specific procedural aspect of the FDPA. *Fell* held that the FDPA violated procedural due process by allowing a death sentence to be imposed without the protections of the Federal Rules of Evidence. While *Fell* adopted a different due process analysis than *Quinones* used, as with its predecessor, the mandate for heightened reliability in capital cases exerted a substantial influence and guided its outcome.⁵⁸⁵

In many ways, *Fell* is a natural outgrowth of *Ring*, which in turn is the progeny of *Jones* and *Apprendi*.⁵⁸⁶ However, this line of cases does not conclusively predetermine *Fell*. The Sixth Amendment guar-

581. "Due process has always been considered a limitation on all the powers of government, legislative as well as executive." MOTT, *supra* note 7, at 602.

582. See MOTT, *supra* note 7, at 74. As Mott points out:

Some scholars see in chapter thirty-nine of the Great Charter from the very first protection of general justice and right. According to such an interpretation, this article was the general norm of all governmental actions and should prove valuable at least as a moral precept controlling the government in all its dealings with individuals.

Id.

583. *Herrera v. Collins*, 506 U.S. 390, 436 (1993) (Blackmun, J., dissenting) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992)).

584. *United States v. Fell*, 217 F. Supp. 2d 469, 490 (D. Vt. 2002). Also, *Fell*'s first ground for relief resembled the *Quinones* argument: the FDPA "fails to avoid sentences of death for the factually and legally innocent." *Id.* at 473.

585. See *id.* at 491 (Relaxing the evidentiary standards at sentencing "significantly undermines the reliability of decisions to impose the death penalty."); *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (The 68% rate of error noted in *A Broken System* suggests that capital cases are less reliable than other cases.).

586. *Fell*, 217 F. Supp. 2d at 490 ("The instant case raises the next issue implicated by the *Apprendi-Ring* logic . . .").

antee of trial by jury is the central issue in these cases.⁵⁸⁷ The FDPA conforms to a literal reading of that line of cases because it requires juries to pass on facts that would lead to the death penalty.⁵⁸⁸ The Second Circuit foreclosed any extension of *Ring* when it asserted that *Ring* only required a jury to hear all elements beyond a reasonable doubt. And because the FDPA provides this, *Ring* requires no more.⁵⁸⁹ *Fell* answered the question that the line of cases does not reach: When the Sixth Amendment requires that a jury and not a judge sitting alone consider certain information that has specific implications, what other fair trial guarantees are required?⁵⁹⁰ *Fell* concluded that due process requires the presence of the rules of evidence and the recognition of the rights to confrontation and cross-examination. To gauge the validity of that conclusion, it is important to analyze the role of due process in *Fell*, the character of statutory aggravating factors, and the precise nature of the FDPA sentencing hearing. The Second Circuit failed to address adequately these aspects of the district court's decision.

1. Due Process in *Fell*

Due process challenges to infirm procedures are not novel to death penalty jurisprudence;⁵⁹¹ however, successful challenges are few in number and have generally attacked only specific death sentences.⁵⁹² By citing *Chambers v. Florida*,⁵⁹³ Judge Sessions indicated that procedural due process guided his scrutiny of the FDPA.⁵⁹⁴ *Chambers* also asserted that the rights to confrontation and cross-examination are "essential to due process."⁵⁹⁵ Procedural due process is the proper vehicle for challenging statutes that have procedures that create a substantial risk that a defendant's sentence will not be based on accurate

587. See *Ring v. Arizona*, 536 U.S. 584, 587 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 471 (2000).

588. See 18 U.S.C. § 3593 (2000).

589. *Fell*, 360 F.3d at 142.

590. See *Fell*, 217 F. Supp. 2d at 485.

591. The Court has used both the Eighth Amendment and the Due Process Clause protect the same interests: nonarbitrary sentences, reliability, and enabling the defendant to present a defense. See Christopher K. Tahbaz, Note, *Fairness to the End: The Right To Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 COLUM. L. REV 1345, 1358-1359 (1989).

592. See *supra* notes 384-422 and accompanying text.

593. *Chambers v. Florida*, 309 U.S. 227 (1940).

594. *Fell*, 217 F. Supp. 2d at 485-86. Judge Sessions's conclusion also sounds in procedural due process: "If capital punishment is to be a part of our federal law, Congress must also determine the procedure by which the death penalty is to be imposed, consistent with Constitutional standards." *Id.* at 491.

595. *Id.* at 486.

information.⁵⁹⁶ The absence of the rules of evidence enables a capital defendant to be sentenced to death without receiving a fair trial, in violation of procedural due process.⁵⁹⁷

Fell's primary antecedent, *Ring*, does not apply procedural due process.⁵⁹⁸ In *Ring*, the Court ruled that Arizona's death penalty statute was unconstitutional on Sixth Amendment grounds.⁵⁹⁹ Even though the role played by the Due Process Clause is not immediately clear in *Ring*, it was an important factor in *Apprendi*.⁶⁰⁰ *Apprendi's* core holding, which was first announced in *Jones*, depends as much on the Due Process Clause as it does on the Sixth Amendment.⁶⁰¹ The Court framed the constitutional issue in *Apprendi* as one that implicated the Due Process Clause and the Sixth Amendment: "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'"⁶⁰² *Apprendi* reiterates the principle that due process requires that every element of an offense be proven beyond a reasonable doubt.⁶⁰³ Under that principle, due process guarantees control the procedures that a

596. See *Townsend v. Burke*, 334 U.S. 736 (1948) (A sentence based on inaccurate information violates due process.). The sufficiency of a substantial risk is relevant here as it is in *Quinones*. *Gregg's* assertion that *Furman* held the death penalty unconstitutional as applied based on a substantial risk of infirm sentencing procedures applies to *Fell*, where the abrogation of the rules of evidence creates a substantial risk of introducing untrustworthy and unreliable information that could lead to arbitrary sentences.

597. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring in the judgment); see also *Morr*, *supra* note 7, at 71 ("[T]here is no doubt that the Englishman considered that judgments not made according to some recognized form of legal procedure were not due process of law.").

598. *Ring v. Arizona*, 536 U.S. 584, 596-97 (2002).

599. *Id.* at 609.

600. See Stephen A. Saltzburg, *Due Process, History, and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243, 249 (2001) (observing that *Apprendi* is a "modern recognition that due process must apply in some measure in sentencing").

601. The rule, first announced in *Jones*, and then affirmed in *Apprendi*, is:

Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)) (internal quotation marks omitted).

602. *Id.* at 476-77 (quoting U.S. CONST. amend. VI) (citations omitted).

603. See *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) ("The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.") (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)) (emphasis and external quotation marks omitted).

sentencing jury uses to find statutory aggravating factors. As the Court in *Apprendi* observed:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.⁶⁰⁴

The protections of the rules of evidence “unquestionably attached” up to the FDPA sentencing hearing. The Government intended to use the otherwise inadmissible hearsay testimony to prove the aggravating factors that exposed Fell to a punishment beyond that authorized by the jury. Due process requires that Fell, or any other FDPA defendant, not be deprived of the rules of evidence at the moment when they are the most crucial procedural protections at the most significant stage of the capital proceeding.⁶⁰⁵

Another advantage that the Due Process Clause provides is that as with *Quinones*, *Fell* could not have been decided solely on Eighth Amendment grounds. The challenge in *Fell* is to a specific procedure of the FDPA and not to the punishment itself.⁶⁰⁶ Addressing the challenge to the FDPA’s relaxed evidentiary standard is properly within the scope of procedural due process,⁶⁰⁷ but not the Eighth Amendment.⁶⁰⁸ Further, the *Jones*, *Apprendi*, and *Ring* line of cases that *Fell* relies on is not the objective indicia that the Eighth Amendment re-

604. *Apprendi*, 530 U.S. at 484.

605. Applying the rules of evidence at the FDPA sentencing hearing honors the rights of confrontation and cross-examination because the rules would bar the hearsay testimony of Fell’s codefendant. Rights of confrontation and cross-examination stem in part from the Due Process Clause. See David A. Hoffman, Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382, 383-84 (1992).

606. See Thurschwell, *supra* note 12, at 16 (“The fundamental Eighth Amendment question is simply whether the individual and crime merit the death penalty, and not whether the procedures by which that question is answered are adequate—which is the question asked under the Due Process Clause.”).

607. “The whole evolution of procedural due process has been in the direction of insisting on fair procedures.” *McGautha v. California*, 402 U.S. 183, 242 (1971) (Douglas, J., dissenting).

608. “The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.” *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting). The Court’s reluctance to hold that the Eighth Amendment requires that general evidentiary rules apply at sentencing is further support for the application of due process, rather than the Eighth Amendment in *Fell*. As the Court stated in *Romano v. Oklahoma*:

Petitioner’s argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment

quires. But like the Eighth Amendment, the Due Process Clause requires heightened reliability, especially with reliable procedures. Judge Sessions makes that point by citing *Beck*, *Gardner*, and *Simmons*, which together show that death penalty statutes that lead to unreliable and inaccurate results may violate due process.⁶⁰⁹ Specifically, *Gardner* recognizes that due process applies at sentencing in part because of the "interest in reliability."⁶¹⁰

*Williams v. New York*⁶¹¹ is an obstacle to applying additional procedural safeguards at a traditional sentencing hearing, but it does not prevent applying the rules of evidence at the FDPA sentencing hearing. The Second Circuit relied on *Williams* when it rejected the district court's call for the rules of evidence at the FDPA sentencing hearing.⁶¹² In *Williams*, a capital case, the Supreme Court held that due process did not require that a capital defendant have the opportunity to confront and cross-examine witnesses during the sentencing proceeding.⁶¹³ The ability of the sentencer to consider all relevant information was significant to the holding.⁶¹⁴ The sentencing proceeding in *Williams* was indeterminate and provided the sentencer with nearly unbridled discretion.⁶¹⁵ The *Williams* Court concluded that re-

does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.

512 U.S. 1, 11-12 (1994). The Court implied that the Due Process Clause, not the Eighth Amendment, was the bulwark against unduly prejudicial evidence when it held that the prosecution could use victim impact evidence at the selection phase. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

609. *United States v. Fell*, 217 F. Supp. 2d 469, 476 (D. Vt. 2002).

610. *Gardner*, 430 U.S. at 359.

611. *Williams v. New York*, 337 U.S. 241 (1949).

612. *Fell*, 360 F.3d at 143-44.

613. *Williams* was decided before the Sixth Amendment right to confrontation was incorporated into the sentencing process in *Pointer v. Texas*, 380 U.S. 400 (1965).

614. *Williams*, 337 U.S. at 247.

615. Several commentators have questioned the validity of *Williams* after the Federal Sentencing Guidelines were imposed. See Mark Harris, Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1886 (1992) (None of the rationales behind *Williams* is relevant under the Federal Sentencing Guidelines.). Harris notes that the *Williams* Court concluded that the right to confrontation was not required at the sentencing proceeding because the sentencing proceeding was not adversarial in nature. *Id.* at 1885. The FDPA sentencing hearing is clearly adversarial in nature. The Government has the burden to prove statutory aggravating factors beyond a reasonable doubt. The defense has the burden of establishing mitigating evidence by a preponderance of the evidence. In light of the adversarial nature of the FDPA sentencing hearing, the relevance of *Williams*' further diminishes. See also Hoffman, *supra* note 605 at 411 (noting that *Specht* limited *Williams* and that the application of the "Confrontation Clause applies at sentencing under the Guidelines should be considered independent of *Williams*"); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 317-21 (1992) (contending that *Williams* is "almost wholly inapplicable" in federal

quiring confrontation rights would be highly impractical.⁶¹⁶ Citing *Williams*, the Second Circuit concluded that rules of evidence would prevent sentencing bodies from “consider[ing] a defendant’s whole life and personal make-up.”⁶¹⁷

Contrary to the Second Circuit’s conclusion, *Williams*’ bar on due process at sentencing and the right to confront and cross-examine adverse witnesses at the sentencing hearing does not control the relaxed evidentiary standard at the FDPA sentencing hearing.⁶¹⁸ The “elements rule” distinguishes the FDPA sentencing hearing from the sentencing proceeding in *Williams*.⁶¹⁹ Further, *Williams* does not preclude the conclusion in *Fell* because the *Williams* Court primarily considered the right of confrontation in light of historical sentencing practices; due process concerns were relegated to the far periphery.⁶²⁰ In contrast, *Fell* used the Due Process Clause to ensure that the right to confrontation was honored.⁶²¹ The Second Circuit relied on historical sentencing practices and did not address the role played by the statutory aggravating factors in creating a distinct trial at the FDPA sentencing stage. The following sections analyze those issues.

2. *The Elements of the Capital Crime*

The FDPA sentencing hearing is unlike a traditional sentencing hearing in large part because the statutory aggravating factors function as elements of an aggravated, capital crime. A brief analysis of the statutory aggravating factors illustrates that point. The FDPA enumerates twenty-seven aggravating factors for three separate cate-

court with Guidelines sentencing, is limited to a “discretion-oriented, indeterminate sentencing system in state court,” and is “undercut” by *Gardner*).

616. *Williams*, 337 U.S. at 247.

617. *Fell*, 360 F.3d at 143 (citing *Williams v. New York*, 337 U.S. 241, 247 (1949)).

618. Courts frequently cite *Williams* to deny claims for more procedural rights at sentencing. See Mark David Harris, *Raising the Quality of Evidence at Sentencing*, 5 FED. SENTENCING REP. 102 (1992). See Herman, *supra* note 615, at 316-17, 349 (observing that *Williams* is “cited more for its attitude than its law” and listing cases).

619. See Tahbaz, *supra* note 591, at 1365. Tahbaz notes that arguments for extending fair trial rights, such as the right of confrontation, that are predicated on the due process clause involve “likening the penalty phase to the guilt phase of trial.” *Id.* This observation supports the use of due process in *Fell* where the sentencing hearing need not be merely likened to the guilt phase of the trial because the sentencing hearing has the effect of a trial on the issue of the defendant’s guilt of the capital crime.

620. See *id.* at 1352; Herman, *supra* note 615, at 321 (“The *Williams* Court was more interested in the ancient history of sentencing procedure than in due process considerations.”).

621. One commentator also noted the strong role that federalism played in shaping the Court’s opinion. Herman, *supra* 615, at 319-21. With the FDPA, there is no need to pay deference to state sentencing procedures.

gories of offenses.⁶²² Prior to the sentencing hearing at which the jury considers aggravating and mitigating factors, the maximum punishment that can be imposed is life imprisonment. A death sentence may not be imposed unless a unanimous jury finds at least one aggravating factor beyond a reasonable doubt.⁶²³ In essence, if the sentencer fails to find at least one aggravating factor, the Government does not prove the requisite elements of the alleged capital crime. Donald Fell is not eligible for the death penalty unless a unanimous jury finds beyond a reasonable doubt that the murder occurred during a kidnapping;⁶²⁴ that the murder was done in an especially heinous, cruel, or depraved manner;⁶²⁵ or that he intended to kill or attempted to kill multiple persons in a single criminal episode.⁶²⁶ If no aggravating factor is found, the harshest punishment Fell could receive is life in prison.⁶²⁷ The statutory aggravating factors are elements of a crime because they expose Fell to a punishment greater than the maximum punishment that is available prior to the sentencing hearing. As elements of a crime, the statutory aggravating factors must be proven to a jury beyond a reasonable doubt.⁶²⁸ Thus, the statutory aggravating factors are unlike facts that only enhance a sentence and do not alter the maximum penalty for a crime.

The FDPA blurs the once distinct line between the guilt and sentencing phases by imposing traditional aspects of a trial at the sentencing hearing, which suggests that the statutory aggravating factors are elements of a crime.⁶²⁹ To further complicate matters, the FDPA stip-

622. 18 U.S.C. § 3592(b)(1)-(3) (2000) lists the aggravating factors for espionage and treason. Section 3592(c)(1)-(16) lists the aggravating factors for homicide. Section 3592(d)(1)-(8) lists the aggravating factors for the drug offense death penalty.

623. *Id.* § 3593(d) (2000).

624. *Id.* § 3592(c)(1).

625. *Id.* § 3592(c)(6).

626. *Id.* § 3592(c)(16).

627. Not finding a statutory aggravating factor beyond a reasonable doubt must be distinguished from the comparative and independent balancing tests described in § 3593(e). *Id.* § 3593(e). In the comparative balancing test, the sentencer determines if the established aggravating factor(s) sufficiently outweigh all the mitigating factor(s). 18 U.S.C. § 3593(e). If the sentencer determines that the mitigating factor(s) are not sufficiently outweighed by the aggravating factor(s), it has the discretion not to impose the death penalty. *Id.* The individual balancing test transpires when there are no mitigating factors. *Id.* In this situation, the sentencer has the discretion to determine if the established aggravating factors independently warrant a death sentence. *Id.* In each of these contexts the defendant has been convicted of a capital crime, unlike the situation when no aggravating factors are found and the defendant is only convicted of the underlying charge, not the capital offense. *Id.*

628. *See In re Winship*, 397 U.S. 358, 364 (1970).

629. To establish an aggravating factor, a unanimous jury must find it to exist beyond a reasonable doubt. 18 U.S.C. § 3593 (c)-(d) (2000)). *See Fell*, 217 F. Supp. 2d at 482. These procedural requirements distinguish *Fell* from pre-*Apprendi* cases that held due process does not require

ulates that the rules of evidence do not apply at the sentencing hearing, which suggests that the statutory aggravating factors are sentencing factors. The schizophrenic nature of the FDPA is not due to rogue legislative drafting. Ironically, the confusion stems from the endeavor to adhere to *Furman*, *Gregg*, *Woodson*, and *Lockett*. The trial characteristics, such as enumerated aggravating factors, the requirement for a jury, and stated burdens of proof, address the need for limited sentencing discretion. The abrogation of the rules of evidence encourage particularized treatment of the capital defendant and the circumstances of the crime by permitting the sentencer to consider more information about those issues. Judge Sessions correctly determined the true nature of aggravating factors by looking at their effect.⁶³⁰ Because the aggravating factors have the effect of exposing Fell to the death penalty, which is beyond the maximum penalty he faced prior to the sentencing hearing, they have the effect of elements of a greater offense. A brief analysis of the Court's most recent distinctions between sentencing factors and elements of an offense supports this conclusion.⁶³¹

To distinguish sentencing factors from elements, *Ring* and *Apprendi* instruct that the relevant inquiry or dispositive question "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"⁶³² *Ring* emphasizes that any factor that exposes a defendant "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" was the functional equivalent of an element of a greater offense.⁶³³ In contrast, a sentencing factor "supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense."⁶³⁴ Traditionally, judges "have always considered

the right of confrontation at sentencing. See *United States v. Castellanos*, 904 F.2d 1490 (11th Cir. 1990); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990). These cases debate the effect the Sentencing Guidelines had on the defendant's rights at sentencing and ultimately rely on pre-Guideline sentencing law to reach their conclusions. *Castellanos*, 904 F.2d at 1494-95; *Beaulieu* 893 F.2d at 1180-81. For a discussion of these cases and others that debate the effect of the Sentencing Guidelines on sentencing, see Hoffman, *supra* note 605, at 392-93. Together, the procedural protections already present in the FDPA, *Apprendi*'s "elements rule," and viewing the FDPA sentencing hearing as a separate trial under *Specht* and *Bullington* represent a clear break from those cases that rely on pre-Guideline sentencing cases.

630. *Fell*, 217 F. Supp. 2d at 483.

631. For a discussion of the Court's debate over elements and sentencing factors, see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1102-23 (2001).

632. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

633. *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (quoting *Apprendi*, 530 U.S. at 483).

634. *Apprendi*, 530 U.S. at 494 n.19 (emphasis in original).

uncharged aggravating circumstances that, while increasing the defendant's punishment, have not swelled the penalty above what the law has provided for the acts charged."⁶³⁵ In *Fell*, as in *Ring*, a statutory aggravating factor is a "sentencing factor that did swell the penalty above what the law has provided [and] function[s] more like a traditional element."⁶³⁶

Harris v. United States instructs that a "judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed."⁶³⁷ Sentencing factors are used to base a sentence within a range provided by statute and not beyond the statutory maximum. Sentencing factors need not "be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt."⁶³⁸ *Harris* also sets forth an analysis to determine if statutory terms are elements of a crime or sentencing factors. That analysis demonstrates that the FDPA statutory aggravating factors are elements rather than sentencing factors. The first step of the analysis involves asking if the legislature made the disputed term an element or a sentencing factor.⁶³⁹ In *McMillan v. Pennsylvania*,⁶⁴⁰ congressional intent was plain on the face of the statute.⁶⁴¹ Neither the FDPA nor the statutes at issue in *Harris* contain explicit indications of congressional intent.⁶⁴² If congressional intent is not clear, the analysis proceeds to the structure of the statute.⁶⁴³ In analyzing the statute at issue in *Harris*, the Court observed: "[F]ederal laws usually list all offense elements in a single sentence and separate the sentence factors into subsections."⁶⁴⁴ The word "shall" often divides the elements of the statute and the sentencing factors.⁶⁴⁵ For example, "shall" often follows a paragraph or sentence of elements and precedes subsections describing sentencing factors. "Shall" functions in this manner in *Harris*. That structure and

635. *Harris v. United States*, 536 U.S. 545, 562 (2002) (internal quotation marks omitted).

636. *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 245 (1999)) (internal quotation marks and citations omitted).

637. *Id.* at 549.

638. *Id.* at 549-50.

639. *Harris*, 536 U.S. at 552.

640. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

641. *Id.* at 82 n.1 (quoting 42 PA. CONS. STAT. § 9712(b) (1982)) ("Proof at sentencing—Provisions of this section shall not be an element of the crime . . .").

642. *See Fell*, 217 F. Supp. 2d at 483 n.7 ("A review of the legislative history of the FDPA reveals no information concerning whether Congress intended to create sentencing factors when it enumerated the mental culpability factors and statutory aggravating factors.").

643. *Harris*, 536 U.S. at 553.

644. *Id.* at 552 (quoting *Castino v. United States*, 530 U.S. 120, 125 (2000)) (internal quotation marks omitted).

645. *Id.* at 552-54. *See also Jones*, 526 U.S. at 233.

language create the presumption that the statute's "principal paragraph defines a single crime and its subsections identify sentencing factors."⁶⁴⁶ On its face, the FDPA appears to create this same presumption; however, close scrutiny reveals that this is not the case.

The FDPA is unique because it essentially imposes the death penalty on other crimes in the U.S. Code.⁶⁴⁷ The elements of the underlying crime are not set forth in the FDPA itself but in other statutes.⁶⁴⁸ Section 3591 sets forth three categories of crimes for which the death penalty can be imposed: espionage and treason,⁶⁴⁹ "any other offense for which a sentence of death is provided,"⁶⁵⁰ and a drug related offense.⁶⁵¹ The elements for espionage⁶⁵² and treason⁶⁵³ appear in the respective statutes for the crimes, not in the FDPA itself. Similarly, the elements for "any other offense for which a sentence of death is provided" appear in the other offenses, not in the FDPA.⁶⁵⁴ In addition to setting forth the elements of the crimes, each of the statutes contain penalty provisions when death is an available sentence.⁶⁵⁵

One would be mistaken to conclude that the aggravating factors in § 3592 were sentencing factors by relying simply on this structural analysis. *Jones* and *Harris* considered factors beyond "critical textual clues."⁶⁵⁶ *Jones* also observed that the word "shall" does not "invariably" separate "offense-defining clauses from sentencing provisions" and that "elements of the offense [may appear] on either side of 'shall.'"⁶⁵⁷ Indeed, the structural analysis is a starting point that, at most, leads to a presumption of the character of specific statutory

646. *Harris*, 536 U.S. at 553.

647. See Little, *supra* note 183, at 540-41 (discussing how the FDPA "overlays" substantive federal crimes and is triggered not by the underlying federal offense, but the phrase "if death results").

648. This is unlike 18 U.S.C. § 924 (2000), which was in dispute in *Harris*.

649. 18 U.S.C. § 3591(a)(1) (2000). The FDPA specifies 18 U.S.C. § 794 ("Gathering or delivering defense information to aid foreign government") and 18 U.S.C. § 2381 ("Treason") as the statutes that contain the elements of espionage and treason, respectively.

650. *Id.* § 3591(a)(2).

651. *Id.* § 3591(b)(1)-(2). The offense must be a violation of § 408 (c)(1) of the Controlled Substances Act (21 U.S.C. § 848 (c)(1) (2000)).

652. 18 U.S.C. § 794 (2000).

653. 18 U.S.C. § 2381 (2000).

654. Donald Fell was charged with carjacking resulting in death (in violation of 18 U.S.C. § 2119(3) (2000)) and kidnapping resulting in death (in violation of 18 U.S.C. § 1201(a) (2000)). The elements of the crimes are not contained in the FDPA but in the carjacking and kidnapping statutes.

655. See 18 U.S.C. § 2119(3) ("if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death."); § 1201(a) ("... if the death of any person results, shall be punished by death or life imprisonment.").

656. *Harris v. United States*, 536 U.S. 536, 553 (2002).

657. *Jones v. United States*, 526 U.S. 227, 234 (1999).

terms. The structural analysis was not solely dispositive in *Harris*. The crucial determinative aspect of the factors in *Harris* was their effect.⁶⁵⁸ Because it seems that the primary purpose in *Harris* was to affirm *McMillan* after *Apprendi*, it is only logical that the central language in the opinion would relate to sentencing factors that increase mandatory minimum sentences rather than the dimensions of the structural analysis.⁶⁵⁹ In both *McMillan* and *Harris*, brandishing a weapon was only a sentencing factor that did not alter the maximum penalty. Instead, those factors “‘up[] the ante’ for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan.”⁶⁶⁰

The statutory aggravating factors in § 3592 have the same effect as the elements in *Apprendi* and *Ring*. The “functional equivalents” of elements are essentially elements.⁶⁶¹ The statutory aggravating factors in the FDPA “swell the penalty above what the law has provided for the acts charged.”⁶⁶² Even though the underlying crimes authorize the death penalty,⁶⁶³ the aggravating factors in § 3592 “expose [Fell] to a punishment greater than that otherwise legally prescribed” and are thus elements of a “separate legal offense.”⁶⁶⁴ The availability of the death penalty in the underlying crimes is not tantamount to the

658. *Harris*, 536 U.S. at 554.

659. The “shall” structural analysis that was applied in *Jones* was not used in *McMillan*.

660. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

661. In *United States v. Lentz*, 225 F. Supp. 2d 672 (E.D. Va. 2002) and *United States v. Regan*, 221 F. Supp. 2d 672 (E.D. Va. 2002), Judge Gerald Bruce Lee of the Eastern District of Virginia incorrectly concluded that the statutory aggravating factors were not elements of an augmented substantive offense. *Lentz*, 225 F. Supp. 2d at 680. Judge Lee applied the same analysis verbatim in *Lentz* and *Regan*. Because *Lentz* was the first of the two cases to be decided, the discussion of Judge Lee’s analysis will cite to it. Judge Lee concluded that *Ring* only mandates that a jury finds the facts required to impose the death penalty. *Id.* at 675. The district court held that *Ring* did not create elements of an aggravated crime. *Id.* The district court argued that *Ring* held that the statutory aggravating factors were the functional equivalents of elements, rather than “actual elements of a new substantive offense.” *Id.* at 679. *United States v. Davis*, 2003 U.S. Dist. LEXIS 5745, at *13-15 (E.D. La. Apr. 9, 2003) and *United States v. Johnson*, 239 F. Supp. 2d 924, 939 (N.D. Iowa 2003), similarly draw a nonexistent distinction between functional equivalents of elements and elements. That unnecessarily formalistic reading of *Ring* ignores that the controlling inquiry is one of effect, not form. The difference between the functional equivalents of elements and actual elements is purely semantic. In describing the statutory aggravating factors in the Arizona statute as “functional equivalents,” the Court did not assign them a lesser status than elements. It labeled those facts “functional equivalents” because Congress did not formally designate those facts as elements of the crime; however, those facts have the same effect as elements. *United States v. Haynes*, 269 F. Supp. 2d 970, 978 (W.D. Tenn. 2003) properly recognizes that *Lentz*, *Regan*, and *Johnson* “posit a distinction without a difference.”

662. *Harris*, 536 U.S. at 561-62.

663. The statutes for treason, espionage, and drug related offenses all make the death penalty available. Section 3591(a)(2) only applies to offense “for which a sentence of death is provided.” 18 U.S.C. § 3591(a)(2)(2000).

664. *Apprendi*, 530 U.S. at 483 n.10.

imposition of the death penalty. That distinction is crucial to understanding how the statutory aggravating factors actually impose a penalty that is greater than what was previously legally prescribed. Authorization of the death penalty only occurs after the sentencing hearing.⁶⁶⁵ Statutes that trigger the FDPA by making the death penalty available thus do not establish the maximum penalties. Again, the death penalty can only be imposed because the statutory aggravating factors expose the defendant to it.⁶⁶⁶

*Sattazahn v. Pennsylvania*⁶⁶⁷ provides persuasive evidence that the statutory aggravating factors are elements of a new offense. In the context of discussing *Ring*, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist in a plurality opinion noted: “for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances”: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.”⁶⁶⁸ The dissenters supported the assertion that statutory aggravating factors in capital proceedings are elements.⁶⁶⁹ A majority of the Court thus espouses the view that statutory aggravating factors are not sentencing factors or functional equivalents of elements that are qualitatively different than elements of an offense.⁶⁷⁰

The Second Circuit did not analyze these issues in the section of its opinion entitled “Flaws with the District Court’s Reasoning.”⁶⁷¹ In failing to address the role of the statutory aggravating factors, the Second Circuit did not recognize that those factors effectively make the § 3593 sentencing stage a separate trial.

665. 18 U.S.C. § 3593(d) (2000) explicitly stipulates that the statutory aggravating factors are elements and not sentencing factors: “If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.”

666. Concurring in *Apprendi*, Justice Clarence Thomas wrote: “One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.” *Apprendi* 530 U.S. at 503 (Thomas, J., concurring). Under this analysis, the government is not entitled to seek the death penalty prior to the sentencing hearing because it has not yet proven any statutory aggravating factors.

667. 537 U.S. 101 (2003).

668. *Id.* at 111.

669. *Id.* at 126 n.6 (“capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate offenses, not mere sentencing proceedings.”) (Ginsburg, J., dissenting) (emphasis in original).

670. See Adam Thurschwell, *After Ring*, 15 FED. SENT. R. 97, 98 (2002).

671. *Fell*, 360 F.3d at 143-46.

3. *A Trial on the Issue of Capital Guilt*

Bifurcated capital proceedings, which are comprised of eligibility and selection phases, are central features of constitutionally valid death penalty statutes.⁶⁷² At the eligibility phase, the prosecution seeks to convict the defendant “of a crime for which the death penalty is a proportionate punishment.”⁶⁷³ At the selection phase, the sentencer evaluates the offense and the defendant’s character and determines if the death-eligible defendant should receive the death penalty.⁶⁷⁴ The jury’s decision at the selection phase is more akin to a moral judgment.⁶⁷⁵ Because that evaluation transpires at the sentencing hearing, that stage resembles a selection phase. But characterizing the FDPA sentencing hearing as a selection phase fails to appreciate that the sentencing hearing is, in effect, an eligibility phase and is, in essence, a trial on the issue of capital guilt.

As in *Apprendi* and *Ring*, the elements in *Fell* create a distinct aggravated crime. Prior to the FDPA sentencing hearing, a defendant is not convicted of a capital offense and the death penalty is not an available punishment. That punishment may only be imposed if the sentencer finds statutory aggravating factors at the sentencing hearing.⁶⁷⁶ Thus, the statutory aggravating factors are “element[s] of the aggravated crime.”⁶⁷⁷ Further, the trademark trial procedures support the characterization of the FDPA sentencing hearing as an eligibility phase.⁶⁷⁸ Because the sentencing hearing is the functional equivalent of a trial, the absence of vital fair trial guarantees, specifically the federal rules of evidence, violates the Due Process Clause.

672. See *Gregg v. Georgia*, 428 U.S. 153, 190-95 (1976). The Court concluded that a bifurcated proceeding best addressed the concerns of arbitrary sentencing; however, it also asserted that bifurcation was not the only procedure that could ensure guided discretion. *Id.* Nevertheless, bifurcated capital proceedings quickly became the norm after *Gregg*.

673. *Tuilaepa v. California*, 512 U.S. 967, 970 (1994).

674. *Id.* at 972-73. An individual determination is not possible if the sentencer is precluded from considering any relevant circumstances of the offense or the offender. *Penry*, 492 U.S. at 317-18; *Lockett*, 438 U.S. at 604; *Eddings*, 405 U.S. at 604.

675. See Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical & Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411, 433 (1992).

676. See 18 U.S.C. § 3593(d)-(e) (2000).

677. *Apprendi v. New Jersey*, 530 U.S. 466, 503 (2000) (Thomas, J., concurring).

678. Section 3593 establishes burdens of proof, allows the government and defendant to rebut any information presented, and provides each side with a “fair opportunity to present argument as to the adequacy of the information.” 18 U.S.C. § 3593 (2000).

Fell cited *Specht v. Patterson*⁶⁷⁹ and *Bullington v. Missouri*⁶⁸⁰ in support of its portrayal of the FDPA sentencing hearing as a trial.⁶⁸¹ In *Specht*, the trial judge based the defendant's sentence on evidence not presented to the jury at trial because the defendant was convicted of indecent liberties under one statute that had a maximum sentence of ten years but was sentenced under another statute that carried a maximum sentence of life imprisonment.⁶⁸² Because the sentencing statute served as a new charge, the Due Process Clause required that the defendant have access to counsel, confront and cross-examine adverse witnesses, and offer evidence on his own behalf.⁶⁸³ Consistent with *Specht*, the FDPA requires that a defendant at a sentencing hearing benefit from counsel, have the opportunity to be heard, and present evidence. But the statutory abdication of the rules of evidence prevents the defendant from confronting and cross-examining witnesses. *Bullington* is even more relevant to the FDPA.⁶⁸⁴

Bullington instructs that a separate sentencing hearing in a capital trial may be the functional equivalent of a trial on the issue of guilt and innocence.⁶⁸⁵ In *Bullington*, the defendant was convicted of murder at the guilt or innocence stage,⁶⁸⁶ but the jury returned a verdict of "imprisonment for life without eligibility for probation or parole for 50 years"⁶⁸⁷ after a separate sentencing hearing.⁶⁸⁸ After the defendant obtained a new trial,⁶⁸⁹ the prosecution filed notice that it would seek the death penalty again and use the same aggravating factors that it attempted to prove at the first trial.⁶⁹⁰ But the Double Jeopardy Clause⁶⁹¹ barred the prosecution from seeking the death penalty a second time because the sentencing hearing at the first trial was "like the trial on the question of guilt or innocence."⁶⁹²

679. 386 U.S. 605 (1967).

680. 451 U.S. 430 (1981).

681. *United States v. Fell*, 217 F. Supp. 2d 469, 486-89 (D. Vt. 2002).

682. *Specht*, 386 U.S. at 607.

683. *Id.* at 610.

684. *Fell* emphasizes the relevance of *Bullington*, stating that the FDPA is "indistinguishable from Missouri's statute in any meaningful way, [and] warrants the same due process protections." *Fell*, 217 F. Supp. 2d at 487.

685. *Bullington*, 451 U.S. at 444.

686. *Id.* at 435.

687. The Missouri death penalty statute provided two "possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years." *Id.* at 432 (citations omitted).

688. *Id.* at 436.

689. *Duren v. Missouri*, 439 U.S. 357 (1979).

690. *Bullington*, 451 U.S. at 436.

691. U.S. CONST. amend. V.

692. *Bullington*, 451 U.S. at 446.

Both the FDPA sentencing hearing and the death penalty statute in *Bullington* share "the hallmarks of the trial on guilt or innocence."⁶⁹³ Those statutes require that the prosecution prove beyond a reasonable doubt "additional facts in order to justify the particular sentence" of the death penalty.⁶⁹⁴ As with the FDPA, if the Missouri jury failed to agree unanimously to impose the death penalty, it could not impose that punishment.⁶⁹⁵ *Bullington* explains that these statutory requirements "afford procedural safeguards to the convicted defendant."⁶⁹⁶ Those safeguards transform the sentencing hearing into "a trial on the issue of punishment so precisely defined by the Missouri statutes."⁶⁹⁷

But there is one significant difference between the FDPA and the statute in *Bullington*. Missouri's death penalty statute subjected the sentencing hearing to the "laws of evidence,"⁶⁹⁸ which arguably characterizes the Missouri statute more like a trial than the FDPA sentencing hearing. However, the fact that the sentencing hearing was "subject to the laws of evidence" was not central to the *Bullington* holding and that dissimilarity is not fatal to *Fell's* reliance on that case. *Bullington* shows that the presence of the rules of evidence in the Missouri sentencing statute had little bearing on its holding. *Bullington* begins with an extensive summary of the key elements of the death penalty statute. That description does not mention that the sentencing hearing was subject to the laws of evidence. Further, all the other crucial characteristics identified in that passage are present in the FDPA.⁶⁹⁹

In addition to the procedural and substantive factors that the Missouri death penalty statute and FDPA sentencing hearing share with a trial, the sentencing stages exert pressures on defendants that are similar to the pressures faced at trial.⁷⁰⁰ Prior to the FDPA sentencing hearing, the most severe penalty the defendant faces is life imprisonment; however, at the sentencing hearing, the defendant faces the death penalty, which exponentially augments any "anxiety and ordeal." These additional emotional factors are unique to death penalty proceedings and are especially pronounced at sentencing hear-

693. *Id.* at 439.

694. *Id.*

695. *Id.* at 435.

696. *Id.* at 433.

697. *Id.* at 438 (citations omitted).

698. *Bullington*, 451 U.S. at 433 n.4.

699. *Id.* at 432-35.

700. *Id.* at 445 ("The 'embarrassment, expense[,] . . . ordeal[,] . . . anxiety and insecurity' faced by a defendant at the penalty phase . . . surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial.") (quoting *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980)).

ings.⁷⁰¹ Because the sentencing hearing is the functional equivalent of a trial, due process requires that fair trial guarantees, particularly the rules of evidence, protect the rights of the defendant.

4. *Fixing the FDPA's Fatal Flaw*

Not addressing the role of statutory aggravating factors after *Apprendi* and *Ring* enabled the Second Circuit to emphasize *Gregg* and *Williams*. The court's assertion that "[f]acts relevant to sentencing are far more diffuse than matters relevant to guilt for a particular crime"⁷⁰² may be true, but does not accurately depict the FDPA sentencing stage. At that stage, the statutory aggravating factors are not diffuse, but are instead relevant to a particular crime—the capital crime alleged by the Government.

If a defendant were tried for a crime in a trial in which the rules of evidence were explicitly renounced, fair trial rights and due process safeguards would diminish to the point of empty gestures. By not imposing the rules of evidence at the sentencing hearing, the FDPA makes admissible evidence that would have been excluded prior to the sentencing hearing. Requiring that the government unilaterally abide by the rules of evidence at sentencing may remedy that deficiency. That solution would safeguard against unreliable evidence at sentencing and not restrict the jury's broad discretion to consider mitigating evidence.⁷⁰³

Fell faced a death sentence based on hearsay testimony that was inadmissible at trial.⁷⁰⁴ Instead of observing the mandate for heightened reliability at capital proceedings, the FDPA lowered the reliability of Fell's possible sentencing hearing. For Fell, that lowered reliability encumbered his Sixth Amendment rights to confrontation and cross-examination.⁷⁰⁵ Because the declarant of the hearsay testimony, Fell's codefendant, was dead, Fell could not confront and test the reliability of the evidence that could potentially have led to the death penalty. Just as the fair trial guarantees are no more than as-

701. See *Caspari v. Bohlen*, 510 U.S. 383 (1994) (refusing to extend *Bullington's* depiction of the capital sentencing proceeding as the functional equivalent of a trial for Double Jeopardy purposes to noncapital sentencing proceedings).

702. *Fell*, 360 F.3d at 143.

703. One potential conflict that arises under a sentencing scheme that requires the government, but not the defendant to follow the rules of evidence is in the context of victim impact evidence, which the FDPA authorizes in § 3593(a). See *Payne v. Tennessee*, 501 U.S. 808 (1991). See also Thurschwell, *supra* note 670, at 100-01.

704. As the government conceded, this hearsay met no exception. *Fell*, 217 F. Supp. 2d at 485.

705. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

pirational notions under the FDPA, the mandate for heightened reliability is gossamer.⁷⁰⁶ Further, abrogating the rules of evidence inhibits the jury's discovery of truth and thus impedes the defendant's right to receive a sentence based on accurate information.⁷⁰⁷ To prevent the complete renunciation of the mandate for heightened reliability, due process requires that the rules of evidence apply at the FDPA sentencing hearing. Applying the rules of evidence would likely prevent the violation of Fell's rights of confrontation and cross-examination and increase the reliability of the sentencing proceeding.⁷⁰⁸

The Court in *Mathews v. Eldridge*⁷⁰⁹ applied a three-prong balancing test to determine if due process requires particular procedures. Even though the *Mathews* test is not the default analysis for all due process claims,⁷¹⁰ it illustrates when the rules of evidence should apply

706. See Tahbaz, *supra* note 591, at 1367-71 (discussing how the right to confrontation is essential to ensure reliability and a fair adversarial proceeding); Herman, *supra* note 605, at 309-10 (Decreased procedural safeguards at sentencing are "undesirable" because defendants are exposed to punishments "on the basis of facts that have not been found in the careful way the Constitution requires in a criminal trial when significant periods of liberty are at stake.").

707. See Kelly, *supra* note 675, at 414-19 (discussing the history, policies, and objectives of the Rules of Evidence). See also Harris, *supra* note 615, at 1899 (admitting hearsay at sentencing also undercuts uniformity in sentencing and violates the defendant's right to receive a fair sentence).

708. For more on the relationship between the Confrontation Clause and reliability, see *Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."). *Craig*, quoting *Dotson v. Evans*, 400 U.S. 74, 89 (1970), also notes: "The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]'". *Id.* See also Harris, *supra* note 615, at 1889 (arguing that defendants should have the right to confront adverse witnesses under the Federal Sentencing Guidelines to help ensure reliability and accuracy of the sentencing proceeding.). The informal procedures at sentencing and the fact-driven determinations that must be made create "problematic" results. *Id.* at 1880. Harris also argued that under an originalist interpretation, the Confrontation Clause should apply at the post-Guidelines sentencing hearing, which strongly resembles a "criminal prosecution." *Id.* at 1889.

709. 424 U.S. 319 (1976).

710. The *Mathews* test is not "an all-embracing test for deciding due process claims." *Dusenberry v. United States*, 534 U.S. 161, 168 (2002). *But see Burns v. United States*, 501 U.S. 129, 148 (1991). In *Burns*, the Court held that a defendant's due process rights were violated when a federal district court did not provide advance notice of its intent to depart from the Federal Sentencing Guidelines. Due process required notice of this upward sentencing departure. *Id.* at 132. To arrive at the conclusion that a federal court could not *sua sponte* upwardly depart from the sentencing guidelines without providing notice, the Court interpreted the Federal Sentencing Guidelines and the requirements of FED. RULE CRIM. P. 32(a)(1). *Id.* at 135-36. In dissent, Justice Souter, who was joined in relevant parts by Justices O'Connor and White, described the *Mathews* test as having broad applicability: "The *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest, and I think that *Mathews* provides the right framework for the analysis here as well." *Id.* at 148 (Souter, J.,

at the FDPA sentencing hearing. Before announcing the contours of that analysis, *Mathews* noted that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances”⁷¹¹ and “is flexible and calls for such procedural protections as the particular situation demands.”⁷¹² That analysis involves balancing

the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷¹³

Balancing the interests at stake in the FDPA sentencing hearing weighs heavily in favor of the capital defendant’s interest in applying the rules of evidence.⁷¹⁴

At the sentencing hearing, nothing less than the defendant’s life is at stake. After the guilt or innocence stage, the capital defendant’s liberty interests diminish because he may receive a sentence of up to life in prison. Only after the sentencing hearing may a capital defendant receive a death sentence. That private interest is unparalleled in significance.

Mathews next requires consideration of the risk of error that is created by the government’s chosen procedure. Renouncing the rules of evidence at the sentencing hearing increases the risk of admitting unreliable evidence and thus greatly augments the risk of error.⁷¹⁵ That increased risk of error is also contrary to the mandate of heightened

dissenting). Justice Souter did not indicate any doctrinal barriers that would prevent him from applying the *Mathews* test to a federal sentencing issue. *Id*

711. *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (internal quotation marks omitted).

712. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted).

713. *Id.* at 335.

714. *Medina v. California*, 505 U.S. 437 (1992), adopted the history-based approach announced in *Patterson v. New York*, 432 U.S. 197 (1977), instead of the *Mathews* analysis, when it concluded that a defendant’s due process rights were not violated when California criminal procedure allocated the burden to prove incompetence to the defendant. *Medina* relied on *Patterson* over *Mathews* because at issue was state procedure. Consequently *Medina* deferred to the state’s “considerable expertise in matters of criminal procedure and the criminal process.” *Medina*, 505 U.S. at 445. *Medina* should not be interpreted to preclude the application of the *Mathews* test to the FDPA. Such a reading imports an analysis tailored to concerns that are not germane to an examination of a federal criminal law. See Herman, *supra* note 615, at 340 (arguing that *Medina* did not explicitly extend to federal criminal proceedings).

715. The underlying purpose of the Federal Rules of Evidence is to promote “growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102.

reliability at capital proceedings. *Fell* illustrates how the relaxed evidentiary standard allows the prosecution to use unreliable, or at least unverifiable, testimony to prove an element of the capital offense. *Fell* could not directly confront his accuser. At best he could collaterally attack the evidence brought against him. Those limitations increased the risk of error and reduced the reliability of the sentencing hearing.⁷¹⁶

To overcome the strong private interest and the substantial risk of error, the Government's interest in maintaining a sentencing proceeding free of the rules of evidence must be significantly high. *Williams v. New York*⁷¹⁷ identified the efficiency and practicality of sentencing hearings as important interests. *Williams* rejected an argument for allowing cross-examination at sentencing and warned that allowing that trial right at sentencing would "endlessly delay criminal administration in a retrial of collateral issues."⁷¹⁸ Specifically, *Williams* cautioned that cross-examination of probation reports that "draw[] on information concerning every aspect of a defendant's life" would spin out of control.⁷¹⁹ Contrary to those predictions, the rules of evidence will not adversely affect the efficiency of the FDPA sentencing hearing. These rules would apply to statutory aggravating factors, not collateral issues. Further, no "retrial" exists because the FDPA does not require that these statutory aggravating factors be litigated during the guilt or innocence stage. Also, the trial judge may control the introduction of any collateral matters if the rules of evidence apply.⁷²⁰ Ultimately, the basis for rejecting additional procedures at sentencing that *Williams* articulates is not persuasive in respect to the FDPA. In additional support of that position is the fact that several states re-

716. The proposal of increasing reliability by imposing more procedural safeguards at the trial level finds an interesting analogue in a more dramatic suggestion offered by Professor Liebman. See James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315 (2002). Professor Liebman proposed a trade-off where capital defendants exchange existing state post-conviction review rights and federal habeas review for higher quality defense counsel, a series of reforms targeted at the prosecution's decision-making process to seek the death penalty, better substantive direct review, and improved data collection services. These reforms are "comprehensive, self-evaluative, and self-correcting." *Id.* at 334. One goal of this proposal is to force the trial courts to internalize the costs instead of creating errors that create costs, which are absorbed by appellate courts. *Id.* at 325. In a similar manner, imposing the rules of evidence at the FDPA sentencing hearing requires the trial court (federal district court) to internalize costs of error by imposing a procedural regime targeted at minimizing those errors.

717. 337 U.S. 241 (1949).

718. *Id.* at 250.

719. *Id.*

720. Because FED. R. EVID. 611(b) limits the scope of cross-examination to that of direct examination, that rule should diminish fears that cross-examination on collateral issues would create an unwieldy and impractical sentencing proceeding.

quire the rules of evidence at capital sentencing hearings.⁷²¹ Compared to the significant interest at stake and the risk of error present in the absence of the rules of evidence, the government's interest in efficient sentencing proceedings is not substantial enough to bar the rules of evidence.

Applying the rules of evidence will not impose rigid constraints on the sentencer's ability to make moral judgments at sentencing, another important government interest. After a unanimous jury finds at least one statutory aggravating factor to exist beyond a reasonable doubt, it then balances the statutory aggravating factors against mitigating factors.⁷²² At that stage, the jury determines if the aggravating factors found to exist outweigh all the mitigation evidence the defense presents. Death, life imprisonment without the possibility of parole, or a lesser sentence are all punishments that the sentencer may impose.⁷²³ Evaluating the weight of aggravation and mitigation necessarily involves subjective and moral decision making. As the broad range of sentencing alternatives suggests, the jury's discretion at the weighing phase is broad. Due to that broad discretion, the jury may express the moral values of its community regardless of the sentence it actually imposes.

The Second Circuit reasoned that the rules of evidence would impermissibly prevent the sentencer from considering the maximum amount of relevant information.⁷²⁴ But applying the rules of evidence to the FDPA sentencing hearing would not violate the Court's repeated assertion that the sentencer should not be prohibited from considering a broad scope of information.⁷²⁵ *Gregg* and *Williams* are commonly cited by courts that have upheld the relaxed evidentiary standard in § 3593.⁷²⁶ But that reliance is misplaced.⁷²⁷ After *Ap-*

721. Louisiana, Missouri, and Virginia apply the rules of evidence at the sentencing hearing. See LA. CODE CRIM. PROC. ANN. art. 905.2(A) (West 2002) ("The hearing shall be conducted according to the rules of evidence"); VA. CODE ANN. § 19.2-264.4 (B) (Michie 2002) ("Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense."); MO. REV. STAT. § 565.030.4 (2001) ("Evidence in aggravation and mitigation of punishment . . . may be presented subject to the rules of evidence at criminal trials.").

722. 18 U.S.C. § 3593(e) (2000).

723. *Id.*

724. *Fell*, 360 F.3d at 143-44.

725. "[T]he sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) (quoting *Zant v. Stephens*, 463 U.S. 862, 875 (1983) (internal quotation marks omitted)).

726. See, e.g., *Fell*, 360 F.3d at 143-44; *United States v. Miner*, 176 F. Supp. 2d 424, 435-36 (W.D. Pa. 2001) (contending that *Gregg* reaffirmed the principle announced in *Williams*, which

prendi and *Ring*, a sentencer should not have unbridled discretion when it considers statutory aggravating factors that are the functional equivalents of elements of a capital offense. Broad discretion at sentencing is appropriate under capital punishment statutes when the defendant is eligible for the death penalty after all of the requisite elements are proved at the guilt or innocence stage. But under the FDPA, the defendant does not become death-eligible until after the prosecution proves statutory aggravating factors, which must be proved at the sentencing hearing. Just as it would be wrong to allow a jury to find the element of bodily harm in a battery case without the rules of evidence, it is equally incorrect to encourage a jury to find the element of "substantial planning and premeditation"⁷²⁸ during an FDPA sentencing hearing.

Resolving whether the Government must abide by the rules of evidence when it attempts to prove nonstatutory aggravating factors is a trickier issue. The nonstatutory aggravating factors do not serve the same purpose as statutory aggravating factors under *Apprendi*. Nonstatutory aggravating factors are not essential to establishing the existence of the capital crime.⁷²⁹ In a situation in which the Government establishes a statutory aggravating factor, it need not prove a nonstatutory aggravating factor in order for the death penalty to become an authorized punishment. Section 3593(d) stipulates that only the aggravating factors "set forth" are required to be found before the death penalty is authorized.⁷³⁰ Nonstatutory aggravating factors are not "set

states that the rules of evidence not preclude the sentencer from considering all "relevant information"); *United States v. Lentz*, 225 F. Supp. 2d 666, 682-83 (E.D. Va. 2002) (citing *Gregg* for the proposition that the jury must have unbridled discretion and arguing that *Williams* precludes the use of the due process clause to apply the rules of evidence at sentencing); *United States v. Cooper*, 91 F. Supp. 2d 90, 97-98 (D.D.C. 2000) (citing *Williams* and *Gregg* for the proposition that strict evidentiary rules do not apply at sentencing); *United States v. Lee*, 274 F.3d 485, 495 (8th Cir. 2001) (*Williams* and *Gregg* support the relaxed evidentiary standard.); *United States v. Frank*, 8 F. Supp. 2d 253, 268-69 (S.D.N.Y. 1998) (noting that *Williams* established that the rules of evidence traditionally do not apply at sentencing and that, under *Gregg*, the unnecessary restrictions should not be imposed on evidence at sentencing).

727. Further, citations to *Williams*'s restrictive view of the due process clause are improper because that case dealt with a reluctance to impose the due process clause on state criminal procedures. *United States v. Matthews*, 246 F. Supp. 2d 137, 142-43 (N.D.N.Y. 2002); *Lentz*, 225 F. Supp. 2d at 683.

728. 18 U.S.C. § 3592(c)(9) (2000).

729. Under §§ 3593 and 3592, the jury in a penalty phase must find at least one of the statutory aggravators beyond a reasonable doubt in order to recommend the death penalty. The statute does not permit the jury to recommend death based only "upon non-statutory aggravating factors." *Minerd*, 176 F. Supp. 2d at 432. See also *Lentz*, 225 F. Supp. 2d at 682 ("[T]he Defendant could not be sentenced to death based solely upon the jurors' finding of non-statutory aggravating factors.").

730. 18 U.S.C. § 3593(d) (2000).

forth" in § 3592. Nonstatutory aggravating factors are relevant at the "weighing" stage of the sentencing proceeding. Allowing the nonstatutory aggravating factors to be proved without the rules of evidence presents a host of practical problems. Many nonstatutory aggravating factors may blend into statutory aggravating factors. For example, one of the most powerful nonstatutory aggravating factors is a victim impact statement. Evidence supporting the victim impact statement may overlap with evidence of the statutory aggravating factor, "vulnerability of [the] victim."⁷³¹ Further, it may be unduly burdensome for the Government, defense, and court and confusing for the jury if the rules of evidence both applied and did not apply for ostensibly similar (but fundamentally different) information. Also, the mandate of heightened reliability seems appropriate for nonstatutory aggravating factors. The apparent solution to this predicament requires applying the rules of evidence to nonstatutory aggravating factors. However, because *Apprendi* does not control nonstatutory aggravating factors, this conclusion finds support only in pragmatism and the interest of heightened reliability.

Providing the jury with a broad scope of information at sentencing enables it to comprehend the nature of the offense and the offender so that it may make an individualized sentencing determination. Thus a tension exists due to the need to restrict evidence, which serves the mandate of heightened reliability, and the need to allow a broad scope of evidence, which is conducive to individualized sentencing determinations. That tension resonates the strain between *Furman v. Georgia*'s⁷³² guided discretion requirement and *Lockett v. Ohio*'s⁷³³ mandate for individualized sentence determinations.⁷³⁴ That strain "demands sentencer discretion that is at once generously expanded and severely restricted."⁷³⁵ To alleviate that tension, the rules of evidence should be unilaterally applied to the government.⁷³⁶

731. 18 U.S.C. § 3593 (c)(11).

732. *Furman v. Georgia*, 408 U.S. 238 (1972).

733. *Lockett v. Ohio*, 438 U.S. 586 (1978).

734. See *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia recognized the tension between guided discretion and individualized sentencing and argued that reconciliation is impossible. *Id.*

735. *Callins v. Collins*, 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting).

736. This proposition is developed in Kelly, *supra* note 675, at 438, 461 ("With regard to the enumerated aggravating elements of the enhanced offense of capital crime, the rules of evidence should be strictly applied. . . . [W]ith regard to evidence offered in mitigation of death and in support of mercy, the rules of evidence should not be applied."). Kelly's proposal antedated the FDPA. Still, he observed that if the required elements of the death sentence are not proved, the death penalty cannot be imposed. "The aggravating circumstances listed are basically elements of any 'capital' crime to be proven, just as 'every fact necessary to constitute the crime' must be proven, beyond a reasonable doubt, at trial." *Id.* at 459 (citations omitted).

Cases that have refused to bar otherwise inadmissible evidence at the FDPA sentencing hearing have not considered the unilateral application of the rules of evidence. Dual evidentiary standards at the FDPA sentencing hearing find support in the underlying policies behind the constitutional requirement of individualized consideration at sentencing. Individual consideration benefits the defendant, not the prosecution and, more specifically, is a mandate that facilitates effective mitigation.⁷³⁷ Cases such as *Woodson* and *Lockett* illustrate those points. *Woodson* teaches that a mandatory death sentence is unconstitutional because it precludes the sentencer from considering mitigating circumstances that weigh against the imposition of the death penalty.⁷³⁸ *Lockett* shows that the sentencer's consideration of "any information" means that it must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁷³⁹ Also, in *Parker v. Dugger*,⁷⁴⁰ the Court overturned a death sentence after determining that the trial court failed to provide adequate attention to mitigating circumstances. The *Parker* court linked individualized consideration with mitigation evidence: "After striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances. This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution."⁷⁴¹ Applying the rules of evidence to the Government and allowing the defendant to present evidence and information unconstrained by those rules is thus consistent with the original construction of individualized consideration at sentencing.

In cases that accept the FDPA's relaxed evidentiary standard and even find it constitutionally required, there is a recognition that individualized sentencing determinations are constitutionally required, but a failure to appreciate that individualized sentencing determinations exist for the defendant's benefit. For example, the Second Circuit cited *Gregg* and *Williams* to support its conclusion that more evidence was required for an individualized determination of the "de-

737. "[T]he Constitution also requires that the sentencer be able to consider "any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense."" *Callins*, 510 U.S. at 1151 (Blackmun, J., dissenting) (quoting *California v. Brown*, 479 U.S. 583, 544 (1984) (O'Connor, J., concurring)).

738. 428 U.S. 280 (1976).

739. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

740. *Parker v. Dugger*, 498 U.S. 308 (1991).

741. *Id.* at 322.

fendant's whole life and personal make-up."⁷⁴² According to the Second Circuit, more evidence was required to achieve heightened reliability.⁷⁴³ But allowing evidence that cannot be tested for reliability, such as the hearsay statement of Fell's deceased codefendant, does not increase reliability at sentencing. Rather, that evidence dramatically decreases reliability. Further, that evidence does not benefit Fell by serving a mitigating purpose and "proffer[ing] . . . a basis for a sentence less than death."⁷⁴⁴

In *United States v. Chong*,⁷⁴⁵ the defendant claimed that the mandate for heightened reliability required that evidence that was inadmissible under the rules of evidence be inadmissible during the FDPA sentencing hearing.⁷⁴⁶ The district court acknowledged that the FDPA's admissibility standard "require[s] information particularized to the individual defendant,"⁷⁴⁷ but it then concluded that otherwise inadmissible "other crimes" evidence offered by the Government to prove a statutory aggravating factor was admissible.⁷⁴⁸ By admitting the "other crimes" evidence and other information over the defendant's hearsay objections, the district court improperly interpreted the requirement for individualized treatment to apply to information submitted by the Government. Despite frequent citations that assert individualized treatment is for the defendant's benefit,⁷⁴⁹ the district court admitted a broad range of evidence offered by the Government. Similarly, in *Minerd*, the court denied the defendant's claim that the relaxed evidentiary standard rendered findings unreliable.⁷⁵⁰ The district court held that the relaxed evidentiary standard was necessary for providing the jury with "all possible relevant information about the individual whose fate it must determine."⁷⁵¹ The district court failed to consider that the plain meaning of this quoted language refers to an expansive consideration of the defendant's character.⁷⁵² Unilaterally

742. *Fell*, 360 F.3d at 143-44.

743. *Id.* at 143.

744. *Lockett*, 438 U.S. at 604 (internal citations omitted).

745. *United States v. Chong*, 98 F. Supp. 2d 1110 (D. Haw. 1999).

746. *Id.* at 1115.

747. *Id.* at 1116. In this section of its opinion, the district court cited the "unbridled discretion" language from *Gregg*. *Id.*

748. *Id.* at 1117.

749. Barring evidence from the sentencing hearing "would severely hamper compliance with the Supreme Court's mandate to particularize sentencing proceedings to each individual defendant." *Id.* at 1115.

750. *United States v. Minerd*, 176 F. Supp. 2d 424, 435-36 (W.D. Penn. 2001).

751. *Id.* at 435 (quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976)) (internal quotation marks omitted).

752. At issue in *Jurek* was the constitutionality of the Texas death penalty statute. Specifically, the Court considered if the jury could make an individualized sentencing determination by

applying the rules of evidence would rectify the convolution of the purpose behind individualized determinations.

Courts that refused to impose the rules of evidence at the sentencing hearing often emphasize that the trial judge had the discretion to ensure the reliability of evidence.⁷⁵³ That argument acknowledges that trial judges have discretion to exclude unconstitutional evidence, but it does not instill uniform standards of heightened reliability that capital cases require. The Second Circuit relied on the discretion of trial judges to screen out unconstitutional evidence when it observed: "The FDPA does not eliminate [the] function of the judge as gatekeeper of constitutionally permissible evidence."⁷⁵⁴ In *Matthews*, the court offered two additional arguments that justified the absence of the rules of evidence from the sentencing hearing. First, the Due Process Clause's protection of matters of fundamental fairness applied regardless of the presence of the rules of evidence.⁷⁵⁵ Second, the jury would ensure reliability by "filtering out the believable from the unbelievable."⁷⁵⁶ In *United States v. Haynes*, the court relied on *Matthews* and concluded that in light of *Jones*, *Apprendi*, *Ring*, and *Harris* that "the mens rea and aggravating factors required to qualify a defendant for the death penalty must be proven by evidence that would pass constitutional muster."⁷⁵⁷ But the *Haynes* court rejected the defendant's argument that abdication of the rules of evidence rendered the FDPA unconstitutional because the rules of evidence are not constitu-

considering "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Jurek*, 428 U.S. at 272. The Court upheld the Texas statute and concluded that it allowed the defendant to elicit relevant mitigating evidence and provide the jury with information necessary to make an individualized sentencing determination. *Id.* at 274-76. *Jurek's* citations to *Woodson* and *Roberts* demonstrate that the concept of an individualized sentencing determination was intended to serve the defendant rather than the prosecution. *Id.* at 271. In rejecting Fell's argument to affirm the district court's decision, the court of appeals cited *Jurek* for the proposition of maximum admissibility of relevant information, but failed to acknowledge that that standard endeavors to accomplish a complete picture of the defendant for mitigation purposes. *Fell*, 360 F.3d at 144.

753. *United States v. McVeigh*, 944 F. Supp. 1478, 1487 (D. Colo. 1996) (recognizing that section 3593(c) "raises the specter of violations of the Confrontation Clause and other fundamental protections contained in the Fifth and Sixth Amendments" but the statute was saved because the trial judge had "considerable discretion in controlling the presentation of the 'information' to the jury in both content and form"); *United States v. Frank*, 8 F. Supp. 2d 253, 268 (S.D.N.Y. 1998) (describing the role of the district court as that of "gate-keeper"). *United States v. Matthews*, 246 F. Supp. 2d 137, 144 (N.D.N.Y. 2002) (recognizing that the evidentiary standard in place enabled the judges to ensure that the defendants constitutional rights, including confrontation, were not violated).

754. *Fell*, 361 F.3d 135, 145 (2d Cir. 2004).

755. *Matthews*, 246 F. Supp. 2d at 143.

756. *Id.* at 145 n.4.

757. *United States v. Haynes*, 269 F. Supp. 2d 970, 985-86 (W.D. Tenn. 2003).

tionally mandated and because the trial court retained the authority to ensure that evidence is not unreliable or unfair.⁷⁵⁸

Unilaterally applying the rules of evidence will lead to more consistency and reliability than these cases offer. In *Crawford v. Washington*, the Court emphasized that confrontation is paramount: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability' Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."⁷⁵⁹ The rules of evidence contain ascertainable standards that help the trial judge determine the admissibility of evidence. A uniform standard will also better achieve heightened reliability at the capital sentencing stage. Further, under *Matthews'* second proposition, exposing the jury to prejudicial evidence with the expectation that it can sift through unreliable evidence may have devastating affects on a defendant's case. These concerns are more pronounced when the prosecution offers evidence to prove a statutory aggravating factor.

Imposing separate standards for the Government and the defense at the FDPA sentencing hearing is not a novel concept. At that stage, the Government must prove an aggravating factor beyond a reasonable doubt.⁷⁶⁰ But the defendant must only prove a mitigating factor by a preponderance of the information.⁷⁶¹ Further, in order to establish an aggravating factor, a unanimous jury must find it to exist.⁷⁶² But the existence of a mitigating factor depends on the finding of at least one juror. A unilateral application of the rules of evidence is consistent with the heightened procedural requirements that the Government already follows and the relaxed standards the defendant abides by at the FDPA sentencing hearing. Requiring the prosecution to submit information that is reliable or that may be tested for reliability guides the sentencer's discretion by not exposing it to unreliable and untrustworthy information. Operating under a relaxed evidentiary standard, the defendant may marshal mitigation evidence that

758. *Id.* at 986-87.

759. *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004).

760. 18 U.S.C. § 3593(c) (2000). Another argument for applying the rules of evidence at sentencing hearing that is not fully explored here is addressed in Kelly, *supra* note 675, at 418. Kelly argues that the rules of evidence have historically applied at proceedings that use the reasonable doubt standard. *Id.* Under this historical analysis, the rules of evidence should apply at the FDPA sentencing hearing because the government must establish the existence of an aggravating factor beyond a reasonable doubt.

761. 18 U.S.C. § 3593(c) (2000).

762. *Id.* § 3593(d).

enables the sentencer to make an individualized sentencing determination.⁷⁶³ Thus, evidence at a FDPA capital sentencing hearing may be simultaneously broad and narrow according to who offers it and for what purpose.

Providing additional support for the proposition that the unilateral imposition of the rules of evidence is feasible and proper for the FDPA sentencing hearing are capital sentencing procedures of several states that apply the rules of evidence to the prosecution but not the defendant.⁷⁶⁴ Also, in *United States v. Bass*, a federal capital case, District Court Judge Arthur J. Tarnow of the eastern district of Michigan ordered the Government to abide by the rules of evidence, but not the defendant:

The Government is further advised that it may only proffer evidence that meets the requirement of heightened reliability as reflected by, at a minimum, the Federal Rules of Evidence both at trial and sentencing for the reasons stated on the record. However, Mr. Bass is not bound by the Federal Rules of Evidence or any heightened standard as it relates to the penalty phase of the trial.⁷⁶⁵

763. More support for not applying the rules of evidence to the defendant comes from traditional notions of mercy toward the capital defendant. See Kelly, *supra* note 675, at 458.

764. Arizona, Arkansas, Connecticut, and New Jersey unilaterally apply the rules of evidence at sentencing. ARIZ. REV. STAT. § 13-703(B) (2002) ("the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials."); ARK. CODE ANN. § 5-4-602 (Michie 2002):

Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but mitigation evidence must be relevant to the issue of punishment, including, but not limited to, the nature and circumstances of the crime, and the defendant's character, background, history, and mental and physical condition The admissibility of evidence relevant to the aggravating circumstances . . . shall be governed by the rules governing the admission of evidence in trials of criminal matters.

Id.

CONN. GEN. STAT. § 53a-46a (c) (2001):

Any information relevant to any mitigating factor may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors . . . shall be governed by the rules governing the admission of evidence in such trials.

Id.

N.J. STAT. § 2C:11-3 (c)(2)(b) (West 2002):

The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors.

Id.

765. *United States v. Bass*, No. 97-CR-80235-DT-01 (E.D. Mi. filed May 5, 2003), available at http://www.capdefnet.org/pdf_library/81378.pdf (last visited Apr. 4, 2004). Bass was convicted of

Judge Tarnow's order and the unilateral application of the rules of evidence practiced in several states show that requiring the Government to follow the rules of evidence at the FDPA sentencing stage is not an unreasonable or impracticable proposition.

Apprendi and *Ring* endeavor to create fair trial procedures. Consistent with that concern and spurred by procedural due process mandates, *Fell* extended *Apprendi* and *Ring* beyond requiring a jury trial. Insisting that the jury find evidence beyond a reasonable doubt is fundamentally important for a fair trial, but a jury cannot guarantee a fair trial if the potentially unreliable evidence presented deprives the defendant of other constitutional rights. Not applying the rules of evidence denies the defendant a fair trial on the issue of guilt of the capital crime and violates procedural due process. In reversing the district court, the Second Circuit failed to address that statutory aggravating factors effectively transform the FDPA sentencing hearing into a trial on the issue of capital guilt. By erroneously viewing the FDPA sentencing hearing to be a traditional sentencing hearing, the Second Circuit undermined instead of achieved heightened reliability.

Except for the rules of evidence, the FDPA sentencing hearing has all the trademarks of a trial. In effect, the sentencing hearing is the only exception to the requirement that the rules of evidence apply in all trials.⁷⁶⁶ When the *Woodson* Court observed that death was different, that difference did not signify such an extraordinary idiosyncrasy.

IV. IMPACT

The implications of *Quinones* and *Fell* begin rather than end with holding the FDPA unconstitutional. The cases are significant for their applications of the Due Process Clause. *Quinones* is the first case to strike down a death penalty statute on due process grounds.⁷⁶⁷ The cases also emphasize glaring errors in the death penalty. Addressing these errors is a complicated but necessary task that requires courts and legislatures to consider fully the consequences of their efforts to

first-degree murder and the jury rejected the death penalty and sentenced him to life in prison without parole. *Jury Chooses Life Sentence Over Death Penalty in Bass Case*, DETROIT NEWS, Aug. 14, 2003, available at <http://www.detnews.com/2003/metro/0308/15/metro-245171.htm> (last visited Apr. 5, 2004); *Murderer, Trafficker Is Spared Death Row*, L.A. TIMES, Aug. 15, 2003, available at 2003 WL 2427585.

766. See *Fell*, 217 F. Supp. 2d at 488.

767. See *United States v. O'Driscoll*, No. 4: CR-01-00277, 2002 U.S. Dist. LEXIS 25845, at *5-6 (M.D. Pa. Sept. 16, 2002). See also Bird, *supra* note 465, at 1340 ("[T]he Court has never squarely faced the issue of whether the Due Process Clause affords substantive protection to life.").

create systems that are more just, fair, and reliable than those that now exist.

In the federal system, the immediate impact of *Quinones* and *Fell* has not deterred the Government from aggressively pursuing the death penalty. Under the FDPA, the Attorney General decides whether to seek the death penalty.⁷⁶⁸ Attorney General Ashcroft's decisions to reverse decisions of local U.S. Attorneys and even to override plea agreements;⁷⁶⁹ to seek the death penalty in jurisdictions that have no death penalty or almost never use it if one exists;⁷⁷⁰ and to seek the death penalty against individuals whose conduct did not warrant the ultimate sanction⁷⁷¹ have given him the reputation of being "on an execution bender" with "an almost biblical bloodlust."⁷⁷² The near unanimous rejection by jurors of the death penalty indicates a schism between the Attorney General and jurors in FDPA cases.⁷⁷³ In context, the government's aggressive use of the death penalty does not diminish the impact of *Quinones* and *Fell*.

A. The Due Process Alternative

Quinones and *Fell* each apply the Due Process Clause to honor the mandate of heightened reliability in capital cases. Their distinct analy-

768. See *United States v. Sampson*, 275 F. Supp. 2d 49, 60 (D. Mass. 2003) (describing Department of Justice procedures for selecting capital cases).

769. See William Glaberson, *Ashcroft's Push for Executions Voids Plea Deal*, N.Y. TIMES, Feb. 1, 2003, at A1; William Glaberson, *Absent Ashcroft Is a Presence at Murder Trial*, N.Y. TIMES, Dec. 21, 2003, § 6 (magazine) at 52.

770. J.M. Lawrence, *Sampson to be Executed*, BOSTON HERALD, Dec. 24, 2003, available at 2003 WL 3046916. See also *The Demands for Death*, BOSTON GLOBE, Dec. 24, 2003, available at 2003 WL 66484283. That editorial commented that the federal

death sentence lodged against [Gary Lee] Sampson yesterday in Boston represents one more scalp for the Bush administration and one large step backwards for the rule of law in Massachusetts While President Bush preaches federalism—giving each state broad latitude in its own affairs—he has allowed Ashcroft to target the 12 states that have no death penalty and override those local policies.

Id. Benjamin Weiser & William Glaberson, *Ashcroft Pushes Executions in More Cases in New York*, N.Y. TIMES, Feb. 6, 2003, at A1; Editorial, *Death Penalty Fervor*, HARTFORD COURANT, Feb. 24, 2003, available at 2003 WL 12322214.

771. See, e.g., Josh Meyer, *Would-Be Spy Won't Face Death Penalty*, L.A. TIMES, Feb. 25, 2003, at A15 (noting that the jury's refusal to impose the death penalty against Brian Patrick Regan was a rebuke to the justice department, which did not seek the death penalty in eleven other espionage cases, most of which involved more serious violations of national security than those Regan attempted to commit).

772. Richard Cohen, *Ashcroft's Mission Unconscionable*, WASH. POST, Feb. 27, 2003, at A27.

773. See *Sampson*, 275 F. Supp. 2d at 59; Don Plummer, *Rudolph Lawyers To Plead for Time; Death Penalty Committee To Hear Attorney's Arguments on Monday*, ATLANTA JOURNAL-CONST., Nov. 16, 2003, available at 2003 WL 66528044 ("Federal juries have rejected the death penalty for 20 of the last 21 defendants who have completed trial and for 38 of the last 43 since 2000.").

ses exemplify a flexible Due Process Clause that is specially attuned to the interest at issue during capital proceedings—the individual defendant’s life—and protects that interest from excessive legislative and executive authority.⁷⁷⁴ The due process challenges in *Quinones* and *Fell* reallocate the inquiry in capital punishment cases from the concerns of the system to those of the individual. Recognizing heightened reliability and protecting the individual’s interests will have a reciprocal effect on the system’s interests. A system that is proven to be unreliable or forces capital defendants to submit to inaccurate proceedings loses its integrity. An unreliable death penalty has questionable legitimacy.

Eighth Amendment challenges concentrate on the nature of the punishment. Individual human dignity is subsumed into institutional considerations of the validity of that punishment. Current applications of the Eighth Amendment exhibit undue deference to these institutional considerations. By not focusing on the punishment itself, the due process challenges in *Quinones* and *Fell* dedicate proper attention to human dignity in relation to the legal regimes that potentially threaten its posterity.⁷⁷⁵ One of the most significant threats to human dignity is the risk of wrongful convictions. The recognition that “the FDPA will inevitably result in the execution of innocent individuals”⁷⁷⁶ must be a cognizable legal claim. Due process is an appropriate mechanism for preventing that ultimate deprivation.⁷⁷⁷

Using the Due Process Clause rather than the Eighth Amendment represents a shift from challenging the death penalty on its morality to challenging it on grounds of individual fairness.⁷⁷⁸ Still, due process challenges inherently address moral issues by focusing on the human dignity of each capital defendant. It is impossible to sever moral issues from an evaluation of an individual’s rights in matters of life and death. In his commutation address, Governor Ryan stated that capital

774. See MOTT, *supra* note 7, at 129 n.23. (“John Adams declared that due process of law ‘if properly attended to might be sufficient even to make a parliament tremble.’”).

775. Similarly, in *Lawrence*, the Court used substantive due process to recognize and protect the dignity of individuals, a dignity that *Bowers* and its blind reliance on an inaccurate historical basis demeaned. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

776. *United States v. Sampson*, 275 F. Supp. 2d 49, 76 (D. Mass. 2003).

777. *Greenholtz v. Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979). (stating that the function of the legal process is to minimize erroneous decisions and “the quantum and quality of the process due” depends on the need to minimize the risk of error).

778. See Kirchmeier, *supra* note 59, at 21 (noting that the “modern [moratorium] movement is primarily concerned about certain aspects of the process of imposing the death penalty, not necessarily about the morality of killing convicted murderers”).

punishment "is arbitrary and capricious—and therefore immoral."⁷⁷⁹ Further, a system that permits wrongful convictions is immoral.⁷⁸⁰

In order to ensure that the individual interests at stake at capital proceedings receive the protections that are due, courts should consider due process challenges raised by capital defendants. Mere recognition of due process challenges is not sufficient. Courts should define the meaning of due process in terms of evolving standards of procedural fairness and ordered liberty. Such an analysis will remain loyal to the often repeated, but rarely recognized, principle that due process is not a frozen concept.

By reversing *Quinones*, the Second Circuit exemplified how treating due process as a historical relic freezes it and shackles it to assumptions that are no longer tenable. As *Lawrence* asserts, the authors of the Fifth Amendment did not intend it to have a limited and finite scope because "[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."⁷⁸¹ Determining the meaning of due process by referencing evolving standards does not entail the abrogation of the fundamental rights standard because the concern for reliability and fairness in capital procedures is deeply rooted in the Due Process Clause, perhaps even more so than in the Eighth Amendment.⁷⁸² Gauging the evolution of standards by relying on the conduct of political majorities may doom the fundamental interests at stake at capital proceedings because of the controversial and highly politicized nature of the death penalty. Death penalty politics counsel against legislative action and other attempts to reform the death penalty.⁷⁸³

Contending that the Due Process Clause offers a viable alternative to the typical Eighth Amendment challenge to capital punishment systems is not "due process romanticism."⁷⁸⁴ The due process analyses in *Quinones* and *Fell* are not quixotic exercises. The "reasoned judg-

779. *Northwestern Speech*, *supra* note 49.

780. For a discussion on how executing of innocent individuals raises substantial moral concerns, see Logan, *supra* note 31, at 1369-71.

781. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

782. See *supra* note 471 and accompanying text. See also Thurschwell, *supra* note 12, at 18.

783. See generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

784. Brennan, *supra* note 474, at 318 (quoting Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 311) (internal quotation marks omitted) (Justice Brennan recalled that his argument that unbridled jury discretion at capital sentencing violated due process was criticized as overly idealistic.).

ment" in those decisions creates alternative arguments for realizing the meaning of heightened reliability in capital cases.

B. Evaluating the Reform Responses

Analyzing the distinct reforms that *Quinones* and *Fell* necessarily entail sheds light on the impact of each case. Even though both cases are ultimately concerned with achieving heightened reliability in capital cases, the remedies the courts provide for the lack of heightened reliability differ. In *Quinones*, Judge Rakoff addressed the systemic problems and risks created by the FDPA with a remedy of equal proportions. In *Fell*, Judge Sessions identified a particular aspect of the FDPA that failed to ensure heightened reliability. Amending the FDPA would rectify that infirmity.

One of the more significant aspects of *Quinones* is that it recognized the problem of wrongful capital convictions, and that recognition may have an impact on the public's awareness of the widespread tragedies of wrongful convictions. Educating the public about the issue of wrongful convictions is essential for an objective and rational discourse on the administration of capital punishment.⁷⁸⁵ In reversing the district court, the Second Circuit neither denied nor rebutted the evidence of wrongful convictions and exonerations; instead, it stated that the risk of executing the innocent has been traditionally assumed.⁷⁸⁶ Future discourse on capital punishment must not neglect to give proper weight to the costs of wrongful capital convictions.⁷⁸⁷

To facilitate the consideration of the costs of wrongful capital convictions, state and federal governments should embark upon projects similar to the *A Broken System* studies. Determining whether innocent individuals have been executed must be a goal of these projects.⁷⁸⁸ The costs of such studies would not be significant. Biological evidence still exists and may be tested to ensure that the individual executed was not innocent. The major impediment to this testing

785. See Gerald Kogan, *Errors of Justice and the Death Penalty*, 86 JUDICATURE 111, 113-14 (2002) (recognizing that executing an innocent person is inevitable is the first thing the public must know in order to be informed about the current administration of the death penalty); Clarke et al., *supra* note 93 (noting that public is generally under informed as to aspects of the death penalty, namely the problem of wrongful convictions).

786. *United States v. Quinones*, 313 F.3d 49, 63 (2d Cir. 2002).

787. Upon hearing of the exoneration of Ray Krone, the one-hundredth death row inmate to be exonerated, Gary Gauger, a death row exoneree himself, observed, "[W]e all have to bear responsibility for this conduct. There's no place for it in a civilized society." Kris Axtman, *US Milestone: 100th Death-Row Inmate Exonerated*, CHRISTIAN SCI. MONITOR, Apr. 12, 2002, at 1-2.

788. See James S. Liebman, *Rates of Reversible Error and The Risk of Wrongful Execution*, 86 JUDICATURE 78, 79 (2002) (recognizing that there is no "systematic effort to determine whether executed individuals were innocent").

has been the reluctance of states and prosecutors to release this evidence. Such action is in itself an indication of a lack of confidence in the reliability of capital punishment.⁷⁸⁹ A perfect illustration of a state's refusal to subject biological evidence to DNA testing is the conduct of Virginia prosecutors in the Roger Keith Coleman case. Coleman was convicted of a 1981 rape-murder and his attorneys failed to meet a filing deadline for their notice of intent to appeal.⁷⁹⁰ The Supreme Court held that Coleman's claims were procedurally defaulted and it denied habeas relief.⁷⁹¹ Coleman proclaimed his innocence until he was executed in 1992.⁷⁹² By refusing to test the available evidence and clinging onto the quasi-closure brought about by Coleman's execution, Virginia has demonstrated a shocking comfort with the possibility that it has executed an innocent person.⁷⁹³ Events in Minnesota demonstrate that prosecutors can and should undertake review of convictions when new technology may reveal wrongful convictions. Susan Gaertner, the Ramsey County Attorney, examined 116 pre-1995 convictions. The study revealed one wrongful conviction. The Minnesota action demonstrates that the costs of comprehensive reviews of convictions can be borne by the states and local municipalities. Further evidence of this fact is action undertaken by San Diego district attorneys, who reviewed more than seven hundred convictions. However, in each of these prosecution-initiated studies, biological evidence was available in only a minority of cases.⁷⁹⁴

789. See *id.* at 80 (observing "[t]he fact that [prosecutors] usually refuse to permit tests that, at no fiscal cost to the state, could categorically confirm the reliability of their work if it was reliable is explicable only if they have some reason to worry that their work was not reliable.").

790. Coleman's attorneys filed the notice of intent to appeal thirty-three days after entry of final judgment and state law required that all notices of intent to appeal must be filed within thirty days of final judgment. *Coleman v. Thompson*, 501 U.S. 722, 728 (1991).

791. *Id.* at 756.

792. John Aloysius Farrell, *Court Bars DNA Test in 1981 Killing Bid To Investigate Va. Execution Fails*, BOSTON GLOBE, Nov. 2, 2002, available at 2002 WL 101981695.

793. See generally JOHN C. TUCKER, MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT (1997). See also John Aloysius Farrell, *Judge Denies Bid for DNA Test to Verify Guilt of Executed Man*, BOSTON GLOBE, June 2, 2001, available at 2001 WL 3936129. (The forensic scientist who had stored the biological data predicted that the state would destroy the evidence: "The whole purpose of the state getting this back is so they can flush it" to destroy proof of a wrongful execution). Also discussed in this article is the case of Frank Lee Smith, who was sentenced to death for a rape-murder. Smith died from cancer in prison. Posthumous DNA testing proved that he was wrongfully convicted. See also Lois Romano, *When DNA Meets Death Row, It's the System That's Tested*, WASH. POST, Dec. 12, 2003, available at 2003 WL 67893205; Alisa LaPolt, *Convicts Could Get More Time for DNA*, FLA. TODAY, Dec. 8, 2003, available at 2003 WL 7155722.

794. Jodi Wilgoren, *Prosecutors Use DNA Test to Clear Man in '85 Rape*, N.Y. TIMES, Nov. 14, 2002, at A22; Paul Gustafson, *DNA Exonerates Man Convicted of '85 Rape*, STAR TRIB. (Minneapolis-St. Paul), Nov. 14, 2002, at 1A available at 2002 WL 5386808.

Another lesson implicit in *Quinones* is that we cannot rely on the system to remedy its own errors. Capital review procedures will not catch wrongful convictions.⁷⁹⁵ As *Herrera* established, substantive errors that do not have the fortune of being accompanied by procedural errors must meet an extremely high threshold before being entitled to a forum.

Quinones may also serve as a catalyst for reforms that attempt to address wrongful convictions. Increased access to DNA testing is typically the centerpiece of these reforms. The purpose of these reforms is both laudable and overdue; however, it is a great error to believe that DNA testing can rectify the unreliability and inaccuracy of capital punishment systems. Moreover, DNA testing will not be able to uncover all wrongful convictions. DNA is not the sole solution to wrongful convictions; it only affects a small number of cases that have biological evidence to test.⁷⁹⁶ Indeed, only thirteen of the 113 death row exonerations were due to exculpatory DNA evidence.⁷⁹⁷ This relatively small number of DNA exonerations undercuts the belief that DNA testing proves that the system works.⁷⁹⁸

Related to this improper reliance on DNA testing is the concept of legitimization, which occurs when reforms “do very little to change the underlying practice but may offer the appearance of much greater procedural regularity than they actually produce, thus inducing a false or exaggerated belief in the fairness of the entire system of capital

795. See Liebman, *supra* note 788, at 82 (“More than 60 percent of the 101 people released from death row since 1973 because they were not guilty were initially approved for execution by one, two, or even a full complement of three levels of judicial review.”).

796. See *The Future of Capital Punishment*, CHI. TRIB. Oct. 3, 2002, at § 1, at 22 (“As for the magic of DNA, it figures in only a small fraction of all crimes. Most criminals don’t leave DNA material behind, particularly in armed robberies and shootings.”); See Coleman Blackerby, *supra* note 67, at 1193-01 (discussing that DNA evidence is rarely available and in the cases in which it is present, there are numerous hurdles individuals must overcome to have that evidence actually tested).

797. DPIC, *Innocence: Freed from Death Row*, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Jan. 6, 2004). See also *Reducing the Risk of Executing the Innocent: The Report of the Illinois Governor’s Comm’n on Capital Punishment: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2002) available at 2002 WL 20317982 (Statement of Professor Lawrence C. Marshall, Legal Director, Center on Wrongful Convictions, Northwestern University Law School) (stating that exonerations through DNA evidence is “the exception, not the norm”).

798. See Lawrence C. Marshall, *Do Exonerations Prove That “The System Works?”*, 86 JUDICATURE 83, 88 (2002) (noting “DNA highlights problems in the system, it does not solve those problems and most certainly does not prove that the system works.”); Kirchmeier, *supra* note 59, at 104 (describing how DNA is used by death penalty proponents to show that the system works).

punishment.”⁷⁹⁹ Relying on DNA reforms as the solution to capital punishment’s problems will inevitably draw attention away from the underlying causes of wrongful convictions. The IPA is a perfect example of a well intentioned reform that fails to address all the causes of error and may legitimate the underlying unreliability and inaccuracy in capital punishment systems.⁸⁰⁰ The IPA endeavors “to reduce risk of mistaken executions” by “improving the availability of DNA testing, and ensuring reasonable minimum standards and funding for court-appointed counsel.”⁸⁰¹ While praiseworthy in many ways,⁸⁰² the IPA fails to safeguard against the unreliability identified in *Quinones* and could “foster an unjustified confidence in our ability to avoid such errors.”⁸⁰³ The IPA fails to address one of the leading causes of mistaken executions, mistaken eyewitness identifications, which is contrary to its stated goal of reducing the risk of mistaken executions.⁸⁰⁴ Except for the call for increased investment in the defense bar, the IPA is an example of an over-allocation of resources onto appellate procedures that will normalize underlying errors by creating the impression of real change.

The issue of wrongful capital convictions cannot be overemphasized; however, phrasing capital punishment reform solely in terms of protecting the innocent may have devastating effects in achieving systemic changes that lead to a fairer and more accurate criminal justice

799. Steiker & Steiker, *supra* note 32, at 422. The authors discuss that DNA testing is of “extremely limited applicability” because of the rarity of biological evidence in capital crimes and that while it may be able to determine an individual’s guilt or innocence, it cannot establish whether an individual deserves the death penalty. *Id.* at 423. Ultimately, DNA reforms “send a message of certainty that does not correspond to the actual reliability they can plausibly secure.” *Id.*

800. See Margery Malkin Koosed, *The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 269 (2002); George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 274-75 (2003) (describing the IPA as a “salutary first step” but as “too narrow to satisfy due process”).

801. Leahy, *supra* note 73, at 1115.

802. The requirement that jurisdictions preserve biological evidence is of significant import because of the pervasive problem of the destruction of biological evidence. Barry Scheck noted that in 75% of cases in the Innocence Project at the Benjamin N. Cardozo School of Law where DNA would demonstrate innocence, the biological evidence was either lost or destroyed. See Barry C. Scheck, *Preventing the Execution of the Innocent: Testimony Before the Senate Judiciary Committee*, 29 HOFSTRA L. REV. 1165, 1168 (2001). Also, it is a positive sign that some statutory language frames the issues in due process terms: “It shocks the conscience and offends social standards of fairness and decency to execute innocent persons or to deny inmates the opportunity to present persuasive evidence of their innocence.” Leahy, *supra* note 73, at 1126.

803. Steiker & Steiker, *supra* note 32, at 423.

804. See Koosed, *supra* note 800, at 271-87 (discussing causes and types of misidentifications); Editorial, *When Believing Isn’t Seeing*, CHI. TRIB., Sept. 30, 2002, § 1, at 16 (Erroneous eyewitness testimony is the leading contributor to wrongful convictions in the United States.).

system.⁸⁰⁵ The legitimating effects of reforms such as the IPA may shroud existing causes of unreliability. An improper response to the concerns identified in *Quinones* could thus diminish the progress that has been and continues to be made in efforts to achieve true reform through efforts such as the Illinois moratorium.⁸⁰⁶ If the general population is induced into believing that the capital punishment system is reliable because of legitimating reforms, wrongful capital convictions will continue to mount and the risks of wrongful convictions and executions will not subside.

While *Quinones* presents extreme, yet perhaps necessary, reforms that must be taken in order to address the issue of wrongful convictions,⁸⁰⁷ statutory amendments may remedy the issues that *Fell* identifies.⁸⁰⁸ As it did when it reversed *Quinones*, the Second Circuit relied heavily on precedent, namely *Gregg*, and as a result, failed to address adequately the issues before it. If the Second Circuit would have recognized statutory aggravating factors as elements, it would have acknowledged that more procedural protections were warranted at the FDPA sentencing hearing. Unilaterally applying the rules of evidence to the Government would supply those protections. The unilateral approach will better honor the mandate of heightened reliability by ensuring that the defendant's sentence is based on reliable information. Not requiring the defendant to submit evidence according to the rules of evidence will allow in a broader range of information regarding the particular circumstances of the offense and the offender. An amended evidentiary standard could track the language of the Arizona, Connecticut, or New Jersey capital sentencing statutes.

A revised § 3593(c) evidentiary standard could be structured in this manner: Evidence offered by the Government to establish the exis-

805. See Steiker & Steiker, *supra* note 32, at 422 (issues involving wrongful capital convictions embody the "new 'moment' in American death penalty politics").

806. See generally Kirchmeier, *supra* note 59, at 77 (observing that if concerns about the execution of the innocent "continue[] to be the main focus of the Moratorium Movement and if states were to address this concern, then the movement would suffer a setback on a scale similar to that suffered by the 1960s Death Penalty Abolition Movement after *Gregg*") (internal citations omitted).

807. Wrongful convictions and executions have historically been primary justifications for abolition of death penalty regimes. See Clarke et. al, *supra* note 93, at 323 (noting that Michigan's decision to abolish the death penalty in 1846 was due in large part to the execution of an innocent man, Patrick Fitzpatrick).

808. Judge Sessions' conclusion that "Congress must . . . determine the procedure by which the death penalty is to be imposed, consistent with Constitutional standards," *Fell*, 217 F. Supp. 2d at 491, seems to be an invitation to the legislature to redraft a constitutional FDPA. See Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1481 n.23 (2002) (listing fourteen states that explicitly bar the rules of evidence at capital sentencing hearings).

tence of any aggravating factor or factors set forth in § 3592(b)-(d) that is necessary for the imposition of the death penalty is governed by the rules of evidence that govern the admission of evidence at criminal trials. Evidence offered by the Government that is not a prerequisite to the imposition of a death sentence or any evidence offered by the defendant is admissible, regardless of its admissibility under the rules of evidence at criminal trials, except that this information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

This revised version of the § 3593(c) evidentiary standard incorporates *Apprendi's* elements rule. Statutory and nonstatutory aggravating factors are distinguished so that the rules of evidence do not apply to the nonstatutory aggravating factors because they are not essential elements of the capital crime. The prejudice standard applies to nonstatutory aggravating factors and any evidence presented by the defense in order to remain consistent with the FDPA's current structure. If the rules of evidence apply to both statutory and nonstatutory aggravating factors, the § 3593(c) evidentiary standard could look like this: Evidence offered by the Government is governed by the rules of evidence that govern the admission of evidence at criminal trials. Evidence offered by the defendant is admissible regardless of its admissibility under the rules of evidence at criminal trials except that this information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

That version implicitly recognizes *Apprendi's* elements rule, yet it applies the rules of evidence to all information offered by the Government. Each version unilaterally applies the rules of evidence and should meet the goals of accurate sentencing, heightened reliability, guided discretion, and individualized sentencing determinations.

Similar to the legitimating effects that the IPA and DNA testing may have on the issue of wrongful convictions, these statutory reforms may have popular appeal yet only have superficial ramifications. Professors Carol and Jordan Steiker have used the term "entrenchment" to describe this form of legitimation.⁸⁰⁹ Entrenchment occurs when incremental changes in procedures "induce at least some satisfaction in the real improvements achieved, and thus, will make people more comfortable than they otherwise would be with the underlying practice, thereby dissipating continued scrutiny of the death pen-

809. See Steiker & Steiker, *supra* note 32, at 424.

alty.”⁸¹⁰ Imposing the rules of evidence at the FDPA sentencing hearing does not create the same false impression of institutional reform that DNA reforms instill. Because the rules of evidence may bar untrustworthy evidence and ensure that the defendant has the opportunity to confront and cross-examine the Government’s witnesses, the rules may better address these underlying causes, such as misidentifications. However, the rules of evidence cannot adequately address systemic constitutionally offensive inequities in capital punishment, such as racial bias.⁸¹¹

Further proof that the proposed evidentiary standards are not sufficient bulwarks against the underlying causes that lead to wrongful convictions are the records of the states that unilaterally apply the rules of evidence to the Government. Since 1973, Arizona has had six death row exonerations.⁸¹² According to *A Broken System*, Arizona’s overall error rate is seventy-nine percent.⁸¹³ These statistics indicate that wrongful convictions cannot be prevented with mere procedural reforms such as imposing the rules of evidence. The application of the rules of evidence may lead to a “false aura of rationality.”⁸¹⁴ The true effect of procedural protections and guidelines is more symbolic rather than substantive.

The false aura of rationality also shields moral issues from critical inquiry.⁸¹⁵ *Gregg* is one of the first and most influential examples of using procedural mechanisms to address substantive and moral issues. In *Gregg*, the Court made clear that “morally inappropriate death

810. *Id.*

811. See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1611 (2001) (“[T]he legal rules designed to ensure heightened reliability have increased the perceived legitimacy of capital punishment.”).

812. DPIC, *Exonerations by State*, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#state> (last visited Jan. 6, 2004). Connecticut and New Jersey have had no exonerations and *A Broken System* did not include these states in its tabular data. Relative to other capital states, New Jersey and Connecticut has used the death penalty sparingly. Connecticut last executed an individual in 1960. Since 1976, seven individuals have been sentenced to death. See *The Death Penalty in Connecticut—an Update as of October 2002*, at <http://www.nodp.org/cnadv/ctupdate.htm> (last visited Jan. 6, 2004). New Jersey’s last execution was in 1963. There are currently sixteen individuals on New Jersey’s death row. See <http://www.nodp.org/nj/> (last visited Jan. 6, 2004).

813. Liebman, et. al, *supra* note 104, at 74. The average overall rate of error is 68%. *Id.* at 75.

814. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 433 (1995).

815. See *id.* at 433-36. The authors discuss how the Court’s death penalty law legitimates capital punishment by insulating courts from making “the necessarily moral task of deciding life or death.” *Id.* at 433. Instead, neutral legal principles guide the courts’ inquiries, the attorneys’ arguments, and the juries’ discretions. *Id.* Because regulation of death penalty procedures rarely address “core issues,” “sentencing judges and juries [are left] with a false sense that their power is safely circumscribed.” *Id.* at 435

sentences in the states could be solved simply by improving the procedures of capital sentencing.”⁸¹⁶ The subsuming of substantive issues into the realm of procedural doctrine is also seen in the Second Circuit’s opinion. There the court cites *Gregg* and *Herrera* to delineate the parameters of what process is due to capital defendants. By doing so, the court effectively ignored the substantive issues, namely the substantial risk of executing the innocent, which demand consideration on moral and substantive grounds and are thus located outside the scopes of *Gregg* and *Herrera*. When the death penalty is perceived to be fair, inaccuracies and inequities become acceptable. The normalization of inadequacy exacerbates the shortcomings of the prevailing analyses for determining the constitutionality of death penalty regimes. The widespread legislative reform that predicates the Eighth Amendment evolving standards test is less likely to occur when the infirmities underlying the death penalty are normalized.

Applying the rules of evidence at the FDPA sentencing hearing is a necessary measure, but we must consider if any amount of procedural protections can ever create a fair and accurate capital punishment system. Such an inquiry may lead us to conclusions similar to those Justice Blackmun reached in his *Callins* dissent. Justice Blackmun recognized that no “legal formulas and procedural rules” could address the “arbitrariness, discrimination, caprice, and mistake” that plague capital punishment.⁸¹⁷ Procedural rules displace problems throughout the capital punishment system, rather than solving them.⁸¹⁸ Rational decisions cannot be made during capital sentencing because the choice whether an individual should live or die is a subjective choice that procedural rules cannot effectively harness.⁸¹⁹ Consideration of the true effects of judicial reforms must not lose sight of the intended purpose of these reforms: to rid capital punishment of unreliability, inaccuracy, arbitrariness, and discrimination. These issues deserve substantial consideration rather than the superficial treatment that procedurally oriented solutions provide.

Reforms that will flow from *Quinones* and *Fell* may not adequately address the underlying causes of unreliability and unfairness in capital punishment systems; however, they are necessary steps if more encompassing and appropriate measures are not taken. In addition to evaluating the legitimacy of *Quinones* and *Fell* reforms, the benefits of due process challenges to capital punishment systems must be utilized.

816. Hoffmann, *supra* note 605 at 823.

817. *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

818. *Id.*

819. *Id.* at 1152-53.

Due process challenges may be inherently nonentrenching because their flexibility and focus on individual rights do not easily lead to the conclusion that capital punishment is fixed. Due process challenges will thus perpetuate the “reforming impulse.”⁸²⁰ Even though possible efforts to reform the FDPA’s flawed evidentiary standard may normalize the underlying causes of inaccuracy in capital proceedings, subsequent due process challenges that posit other individual interests will continue the impulse to reform, suspend, or even abolish capital punishment.⁸²¹ But these complicated issues involving potential reforms may be moot if courts follow the lead of the Second Circuit and avoid difficult questions by relying on precedent that is becoming more detached from issues that are constantly evolving.

V. CONCLUSION

Judge Sessions did not exaggerate when he observed that “[c]apital punishment is under siege.”⁸²² Declining public support reflects increasing discomfort with the unreliability and inaccuracy of capital punishment. These concerns resonate in federal and state legislation. Studies focusing on the reliability and fairness of capital punishment have revealed that gross inequities and inaccuracies plague a system in which the mandate of heightened reliability should reign supreme. Governor Ryan’s momentous decisions to pardon four wrongfully convicted death row inmates and to commute the remaining 164 death sentences to life without parole has been the most significant indicator of the mounting concern that surrounds capital punishment.

Quinones and *Fell* addressed the lack of reliability and accuracy in capital punishment by applying the Due Process Clause to declare the FDPA unconstitutional. Those cases demonstrate that the Due Process Clause may be used to honor the mandate of heightened reliability in capital proceedings. In the capital context, the Due Process Clause shifts the relevant inquiry from what is institutionally pragmatic and historically accepted to what the individual’s rights demand. Each case recognizes that the meaning of due process in a given situation cannot be frozen in place and that due process is a flexible concept that must be interpreted according to evolving standards of fairness and ordered liberty. Rather than having a clearly defined content, the Due Process Clause is a general safeguard for human

820. Steiker & Steiker, *supra* note 32, at 421.

821. See generally Thomas P. Sullivan, *Repair or Repeal—Report of the Governor’s Commission on Capital Punishment*, 90 ILL. B.J. 304 (2002).

822. *United States v. Fell*, 217 F. Supp. 2d 469, 490 (D. Vt. 2002).

rights.⁸²³ Recognizing that the meaning of due process is not a stagnant formula enables courts to reevaluate it in light of recent revelations.⁸²⁴ *Quinones* properly considered that over one hundred exonerations evidence capital punishment's fallibility. In reversing *Quinones*, the Second Circuit applied a rigid interpretation of due process and showed undue deference to institutional concerns at the cost of the imperiled individual interests. *Fell* correctly viewed the statutory aggravating factors as functional equivalents of elements that require the rules of evidence. In reversing *Fell*, the Second Circuit failed to acknowledge the true effect of the most critical stage of a federal death penalty proceeding—the FDPA sentencing hearing. In each decision reversing the lower courts, the Second Circuit imposed Eighth Amendment standards and avoided the due process issues presented.

Quinones and *Fell* necessarily entail reform; however, these reforms should be thoroughly evaluated to prevent the normalization of the underlying causes of error. Future application of a flexible and evolving Due Process Clause may help prevent a "false aura of rationality" from deluding the participants in capital punishment proceedings and the general public into believing that capital punishment is administered reliably and accurately.

Quinones and *Fell* remind us that we must recognize our own fallibility and realize that our devices are equally, if not more, subject to error.⁸²⁵ Recognizing our fallibility and conceding that capital punishment is broken are essential steps that we must take in order to have a rational discussion on the death penalty.⁸²⁶ *Quinones* and *Fell* address the question that guided Senator Leahy's support of the IPA: "[W]hat

823. MOTT, *supra* note 7, at 142 (noting that colonists considered the "law of the land" to be a "catch-all phrase" for "human rights").

824. Due process "is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

825. "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

826. U.S. District Judge Michael A. Ponsor presided over *United States v. Gilbert*, a federal capital trial where a jury convicted Kristin Gilbert of three counts of first-degree murder, but was deadlocked as to sentence. Michael A. Ponsor, *Life, Death and Uncertainty*, 14 FED. SENT. R. 60, 63 (2001). Due to the deadlocked jury, Judge Ponsor sentenced Gilbert to life imprisonment without possibility of release. *Id.* Reflecting on this experience, Judge Ponsor observed:

I love our judicial system, and I am proud to serve in it. As I believe this trial demonstrated, no structure of law, anywhere or at any time, has tried so earnestly to protect the rights of those involved in it. But I have a hard time imagining anything as complicated as a capital trial being repeated very often, even by the best system, without an innocent person eventually being executed.

Id.

kind of society [do] we want America to be in the 21st Century [?]"⁸²⁷ Some envision a society in which subjecting individual lives to unreliable and inaccurate systems is an acceptable practice.⁸²⁸ *Quinones* and *Fell* envision a society in which such conduct is intolerable.

*Joshua Herman**

827. Leahy, *supra* note 73, at 1115.

828. See Steve Mills, *Texas Defies Drift Against Executions; Death Chamber Runs at Record Clip*, CHI. TRIB. Feb. 23, 2003, § C at 1; Bill Murphy, *Death Row: Status Quo; Texas Undeterred by Illinois' Ripple Effects*, HOUS. CHRON., Jan. 19, 2003, at A1, available at 2003 WL 3231523 (noting that "the Lone Star state's death penalty system churns forward with machine-like efficiency" in light of Illinois' dramatic actions to address the inequities and inaccuracies in its death penalty regime).

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